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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 600

KEZIAH REED, GEORGIANA R. SIMPSON, LILLIAN M. H. REDDING, ETC., ET AL., PETITIONERS,

vs.

LORENZO ALLEN

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED DECEMBER 29, 1931

CERTIORARI GRANTED JANUARY 25, 1932

(36,414)

(36,414)

SUPREME COURT OF THE UNITED STATES

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[fol. 1] [Captions omitted]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

At Law. No. 74482

LORENZO ALLEN, Plaintiff,

vs.

HANNAH STEVENSON, Defendant

DECLARATION—Filed December 14, 1927

First Count. That Lorenzo Allen sues the defendant Hannah Stevenson, to recover possession of the following described premises, to wit:

Lot eight hundred and seven (807) in Square three hundred and nine (309) Known as premises 1612 Eleventh [fol. 2] Street, Northwest, situated in the City of Washington, District of Columbia, and all of rights, privileges, easements and appurtenances to the said land belonging or in anywise appertaining, in which said land and premises the said plaintiff claims the ownership in fee simple as the sole lineal heir of Silas Holmes, deceased, his great-grandfather, see Exhibit "A" attached and to be considered as a part hereof and plaintiff says that he was heretofore, to wit on the sixth day of August, 1926, lawfully possessed of said land and premises, and on said date while plaintiff was so lawfully possessed, the defendant entered wrongfully into possession of the same, and withholds possession thereof from the plaintiff.

And the plaintiff claims possession of the said land and the improvements thereon and the appurtenances thereunto belonging, together with the costs of this suit.

Second Count. And the plaintiff, Lorenzo Allen sues the defendant Hannah Stevenson, for money payable by defendant to the plaintiff, for that defendant, having as aforesaid, ejected the plaintiff from the aforesaid premises, has from the day and date aforesaid taken, and received and continues to take and receive, the rents, issues, and profits thereof, and to use, occupy, and enjoy the said premises to

the damage of the plaintiff in the sum of three hundred and forty dollars ($340.00), which amount the plaintiff claims, besides the cost of this suit.

George E. C. Hayes, W. H. Lewis, Chas. H. Hemans,
Attorneys for Plaintiff.

List in Support of Declaration

1. Deed from William B. Todd to Silas Holmes, dated the 18th day of September, 1865, and recorded December 7, 1865, among the Land Records of the District of Columbia.

2. Deed from William B. Todd, et ux. to Silas Holmes, dated the 15th day of January, 1870, and recorded January 29, 1870, among the Land Records of the District of Columbia.

[fol. 3] 3. Deed from William E. Todd, et ux. to Silas Holmes, dated the 15th day of January, 1870, and recorded October 2, 1888, as instrument No. 23, among the Land Records of the District of Columbia.

4. The pleadings and proceedings in the cause of Thomas Walker, Plaintiff vs. Lorenzo Allen, et al., Defendants, Equity No. 40408, In The Supreme Court of the District of Columbia.

5. The pleadings and proceedings in the case of Lorenzo Allen, Appellant vs. Keziah Reed, et al., Appellants, No. 4426, In The Court of Appeals of the District of Columbia.

George E. C. Hayes, W. H. Lewis, Chas. H. Hemans,
Attorneys for Plaintiff.

In Supreme Court of District of Columbia

Motion of Keziah Reed et al. to be Substituted as Parties Defendant—Filed January 4, 1928

Come now Keziah Reed, Thomas Johnson, Annie Goodwin, James T. Holmes, Joseph E. Holmes, Lillian Holmes, Jennie B. Goldsborough, Jesse V. Holmes, Etta Lockwood, Georgiana R. Simpson, James R. Simpson, Virginia Robin-

son, Randolph Thompson, Mary L. Day, Henry Thompson, Sampson Thompson, Benjamin Mabry, Lewis H. Redding, Louis L. Redding, Cora G. Redding, James T. S. Redding, Lillian M. H. Redding, Infant, by her next friend Lewis H. Redding, Margaret M. Redding, infant, by her next friend Lewis H. Redding, by their attorneys, Clephane and Latimer, and say that Hannah Stevenson, named as defendant in the declaration herein filed, is their lessee or tenant of the land and premises described in said declaration, and they now move, in accordance with the statute in such cases made and provided, that they be made parties defendant herein in the place and stead of the said Hannah Stevenson to enable them to defend this action.

In support of the foregoing motion there is attached hereto and prayed to be read as a part hereof, the affidavit of the said defendant Hannah Stevenson.

Walter C. Clephane, J. Wilmer Latimer, Attorneys for the Above-named Moving Parties.

[fol. 4] Notice

To Messrs. George E. C. Davis, W. H. Lewis, Charles H. Hemans, Attorneys for Plaintiff:

Please take notice that the foregoing motion will be for hearing before the Justice holding the Circuit Court to which it may be assigned on Friday, January 6, 1928.

Walter C. Clephane, J. Wilmer Latimer, Attorneys for the Above-named Moving Parties.

AFFIDAVIT IN SUPPORT OF MOTION TO SUBSTITUTE PARTIES DEFENDANT

* * * * * * * *

DISTRICT OF COLUMBIA, ss:

Hannah Stevenson, being first duly sworn, on oath deposes and says, that she is the same person named as defendant in the declaration filed herein to recover possession of Lot Eight Hundred Seven (807) in Square Three Hundred and Nine (309), known as premises No. 1612 Eleventh Street, Northwest, situated in the City of Washington, District of Columbia; that this affiant is now and was at the

time of the filing of the above-entitled suit, and the service of process upon her therein, in possession of said land and premises as the tenant or lessee of Keziah Reed, Thomas Johnson, Annie Goodwin, James T. Holmes, Joseph E. Holmes, Lillian Holmes, Jennie B. Goldsborough, Jesse V. Holmes, Etta Lockwood, Georgiana R. Simpson, James R. Simpson, Virginia Robinson, Randolph Thompson, Mary L. Day, Henry Thompson, Sampson Thompson, Benjamin Mabry, Lewis H. Redding, Louis L. Redding, Cora G. Redding, James T. S. Redding, Lillian M. H. Redding, Infant, Margaret M. Redding; that she has no other interest in the subject-matter of this suit, and, therefore, she hereby requests and consents that said last-named persons be made parties herein in the place and stead of this affiant.

Hannah Stevenson.

Subscribed and sworn to before me this 29th day of December, A. D. 1927. Ella Becker, Notary Public., D. C. (Seal.)

[fol. 5] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

ORDER GRANTING MOTION TO BE MADE PARTIES DEFENDANT—January 6, 1928

Session resumed pursuant to adjournment Mr. Justice Bailey, presiding.

* * * * * * * *

Upon consideration of the motion of Keziah Reed and others to be substituted as parties defendant, and by agreement of the counsel herein, it is ordered that Keziah Reed, Thomas Johnson, Annie Goodwin, James T. Holmes, Joseph E. Holmes, Lillian Holmes, Jennie B. Goldsborough, Jesse V. Holmes, Etta Lockwood, Georgiana R. Simpson, James R. Simpson, Virginia Robinson, Randolph Thompson, Mary L. Day, Henry Thompson, Sampson Thompson, Benjamin Mabry, Lewis H. Redding, Louis L. Redding, Cora G. Redding, James T. S. Redding, Lillian M. H. Redding, infant, by her next friend Lewis H. Redding, Margaret M. Redding, infant, by her next friend Lewis H.

Redding, by their attorneys, Clephane and Latimer, be, and they are hereby, made parties defendant herein in the place and stead of the said Hannah Stevenson.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

PLEAS—Filed January 16, 1928

* * * * * * * *

I. Come now Keziah Reed, Thomas Johnson, Annie Goodwin, James T. Holmes, Joseph E. Holmes, Lillian Holmes (now Lillian Holmes Redding), Jennie B. Goldsborough, Jesse V. Holmes, Etta Lockwood, Georgiana R. Simpson, James R. Simpson, Virginia Robinson, Randolph Thompson, Mary L. Day, Henry Thompson, Sampson Thompson, Benjamin Mabry, Lewis H. Redding, Louis L. Redding, Cora G. Redding and James T. S. Redding, who, by order of this Honorable Court, have been substituted among the parties defendant in this case in place of their tenant Hannah Stevenson, originally named as defendant herein, and for plea to the declaration and each count thereof say:

[fol. 6] That heretofore, to wit, on the first day of June, 1926, at the City of Washington, in the District of Columbia, a suit in ejectment was filed against the plaintiff in this cause in this Honorable Court, the same being numbered 71594, at Law, in which said suit the same persons who are now defendants in this suit were plaintiffs; that in said ejectment suit filed in 1926, as aforesaid, there was one other party plaintiff, to wit, Silas Holmes, a nephew of the Silas Holmes mentioned in the declaration in the case at bar, and which said nephew has, since the judgment in the said ejectment suit of 1926, departed this life intestate, leaving as his only heirs at law his brothers and sisters James T. Holmes, Joseph E. Holmes, Lillian Holmes (now Lillian Holmes Redding), Jesse V. Holmes, Jennie B. Goldsborough, and the husband, Lewis H. Redding, of a deceased sister, Mary Redding, who departed this life intestate, leaving as her only heirs at law and next of kin, the following children, Louis L. Redding, Cora G. Redding, James T. S. Redding, who are adults and Lillian M. Red-

ding and Margaret M. Redding, who are infants, all of which persons were parties plaintiff to the said ejectment suit of 1926, and are now parties defendant in this suit. And these defendants also say that the property claimed in said ejectment suit in 1926, embraced the same identical property as is claimed in the declaration filed in this suit, and the title to the said property upon which the defendant in that suit relied is the same title as that by virtue of which he is claiming to recover in the suit at bar. And in both of said suits the declarations contain counts for mesne profits from the said identical property. And defendants say that such proceedings were had in this Court and in the ejectment suit of 1926, so as aforesaid brought by the plaintiffs therein against the plaintiff in this suit, who was defendant therein, that afterwards, to wit, on the 2d day of August 1926, it was by this Court considered and adjudged that the plaintiffs therein who are the substituted defendants in this suit should recover from the defendant in said suit of 1926, who is the plaintiff in this suit, the possession of the real estate claimed by the plaintiff in this suit, and the mesne profits therefrom to the time of the judgment therein, as well as the costs of said action to be taxed by the Clerk, with the right to have execution therefor, thereby [fol. 7] establishing the title to said real estate as between the parties thereto and hereto, as by the record and proceedings thereof still remaining in this court will more fully and at large appear; which said judgment still remains in full force and effect, not appealed from, and not in the least reversed or made void.

II. For a further plea to the first count of said declaration, these defendants admit that plaintiff claims the ownership of the land and premises therein mentioned and described, and they also admit that on, to wit, the 6th day of August, 1926, defendants, through their tenant Hannah Stevenson, entered into possession thereof, but defendants deny that plaintiff was on, to wit, said last named date, lawfully possessed thereof. As to all other averments of said first count these defendants say that they have no knowledge or information thereof sufficient to form a belief.

III. And for a further plea to the second count of said declaration these defendants say that from the date therein referred to they have taken and received and now continue

to take and receive the rents and issues from said premises, being the rents paid by their tenant, Hannah Stevenson, and that through their said tenant they have used, occupied and enjoyed the premises therein referred to. But these defendants say that there have been no profits from the said premises nor are there likely to be for many months to come, because all the rents and issues therefrom have been necessarily expended in paying for needed repairs thereon and for taxes and other expenses in connection with said property. As to all other averments of said second count defendants say that they have no knowledge or information thereof sufficient to form a belief.

Clephane & Latimer, Gilbert L. Hall, Attorneys for Defendants Above Named.

[fol. 8] List of All Deeds, Proceedings, or Other Documents Relied Upon by Defendants as Constituting Chain of Title

* * * * * * *

Deeds: None.

Proceedings: The pleadings and proceedings in the case of Keziah Reed, et al. vs. Lorenzo Allen, At Law No. 71594, in the Supreme Court of the District of Columbia.

Other documents: None.

Clephane & Latimer, Gilbert L. Hall, Attorneys for Defendants Above Named.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

STIPULATION AS TO AMENDING DECLARATION, ETC.—Filed January 16, 1930

* * * * * * *

It is hereby stipulated by and between the attorneys of record herein for the plaintiff and for the defendants, as follows:

1. Count 1 of the declaration herein shall stand amended by substituting the date of May 28, 1927, in lieu of the date, August 6, 1926, and Count 2 of said declaration shall stand

amended by inserting the date of May 28, 1927, in lieu of the words "from the day and date aforesaid".

2. The plaintiff may forthwith file a replication to the plea herein of the adult defendants filed January 19, 1928, to the declaration and each count thereof.

3. The adult defendants may within ten days, excluding Sundays and legal holidays from the date of the filing of said replication, reply or plead thereto as they may be advised, and thereafter further pleading, if any, shall conform to the rules of this Court.

4. Pending the conclusion of the further pleadings hereinbefore provided for, this suit shall remain upon the trial calendar and may be placed upon the daily assignment for trial upon motion of any of the parties, when the pleadings have been perfected and the case is at issue.

[fol. 9] 5. This suit and Law No. 74481, pending in this Court between the same parties, shall be consolidated for trial and tried together.

Dated this 16th day of January, 1930.

Alvin L. Newmyer, George C. Gertman, Attorneys for Plaintiff. Clephane & Latimer, Attorneys for Defendants.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

REPLICATION—Filed January 16, 1930

* * * * * * *

By permission of the Court first obtained to file this replication, the plaintiff says:

It is true, as alleged in the said plea, that on the first day of June, 1926, the substituted defendants here filed against the plaintiff here (defendant there) a suit in ejectment in this honorable Court, same being No. 71,594, at law, claiming the same property as described in the declaration herein.

Plaintiff says, however, that in that suit the said defendants here (who were plaintiffs there) as their source of title and right to possession, relied solely upon items 4 and 5 of the last Will and testament of Silas Holmes, deceased,

recorded in the office of the Register of Wills of the District of Columbia in Wills Book 44 folio 145, and upon a decree of the Supreme Court of the District of Columbia passed in Equity Cause No. 40,408, dated July 24, 1925, recorded in Equity Minutes No. 125 at page 318 of said Court, and from which decree plaintiff Alonzo Allen perfected an appeal to the Court of Appeals of the District of Columbia. Items 4 and 5 of said Will, and said decree of July 24, 1925, being as follows:

Item 4. That upon the decease of my said wife and daughter, the latter leaving issue her surviving, who are minors, all of said above described Real E-tate, remaining unsold, as hereinafter provided, shall be sold by the then executor of my will, under the authority of the Orphans' [fol. 10] Court of the District of Columbia and the proceeds thereof invested under the orders of said court, and the interest arising from said investment applied to the support of said minor children of my said daughter, and the principal, upon said children arriving at the majority of the youngest of them, shall be divided into and paid to them in equal shares; after deducting from said principal one Thousand Dollars, of said sum, which I hereby give, devise and bequeath to my nephew and adopted son, Walter Holmes.

Item 5. If after the decease of my said wife, my daughter shall die without leaving issue surviving, then in that case, I will, devise, and bequeath all of said property to the said nephew and adopted son, Walter Holmes, and to my brothers and sisters then living, or to their heirs, if deceased, in equal shares.

This cause came on to be heard upon the issues raised by the pleadings between the parties defendant hereto, as more particularly set forth in their answers to the bill of complaint, said defendants Lorenzo Allen on the one hand and the defendants Keziah Reed, et al., on the other, having heretofore by decree entered herein been required to interplead between them touching their rights to the fund ordered to be deposited in the Registry of the Court by the plaintiff, Thomas Walker, and it appearing to the Court that the determination of the proper disposition of said

money depends upon the true construction of the last will and testament of Silas Holmes, deceased, late of the District of Columbia, duly admitted to probate and record by this Honorable Court and now of record in the office of the Register of Wills of the District of Columbia, and the parties having stipulated in open court that the facts set forth in the bill of complaint and in the answers thereto as to the heirship of said parties defendant are true, and the questions of law having been argued by counsel and duly considered by the Court, it is, by the Court, this 24th day of July, A. D., 1925,

Adjudged, ordered and decreed that the true interpretation of the aforesaid will of the said Silas Holmes, deceased, is that upon the death of said testator's daughter Virginia Allen, without leaving child her surviving, the real estate described in the bill of complaint, of which said testator died seized and possessed, is devised to Walter Holmes, the [fol. 11] adopted son of said Silas Holmes, and to the brothers and sisters of the said Silas Holmes, or to their heirs, if deceased, in equal shares, share and share alike, per stirpes; and it appearing to the Court that the fund on deposit in the Registry of the Court as aforesaid represents the rents which have accrued from said real estate since the death of the aforesaid Virginia Allen, it is,

Adjudged, ordered and decreed that the said rents be divided among the aforesaid Walter Holmes and the other defendants hereto, who are brothers and sisters of the said Silas Holmes, deceased, or heirs at law of deceased brothers and sisters of the said Silas Holmes, in equal shares, per stirpes.

And it is further adjudged, ordered and decreed that the Court costs, including fee of guardian ad litem, shall be paid out of the assets of the estate.

James F. Smith, Acting Justice.

From the foregoing decree counsel for defendant Lorenzo Allen notes an appeal to the Court of Appeals in open court, whereupon the amount of bond to cover costs of appeal is fixed at One Hundred Dollars or a cash deposit in lieu of bond.

James F. Smith, Acting Justice.

The record in said ejectment case No. 71594, shows the following:

To the declaration the following plea was filed by the defendant on June 18, 1926:

And for further plea to the said declaration, the said defendant, by leave of the court, says that on or about the 11th day of November, A. D. 1892, one Silas Holmes, a citizen of the United States and a resident of the District of Columbia, signed, sealed, published and declared as and for his last will and testament, in the presence of three competent witnesses, a certain paper writing, and that the said certain witnesses, in his presence and in the presence of each other, and at his request, then and there subscribed their several names to said paper writing as witnesses [fol. 12] thereof; and the said defendant further avers that in and by the said paper writing, the said Silas Holmes devised the property described in the plaintiffs' declaration to one Annie Holmes, his widow, and to Virginia Allen, his daughter and only child, during their natural lives, as joint tenants; that the said Annie Holmes, widow, died in the District of Columbia on or about the 8th day of February, 1916, and the said Virginia Allen, daughter and only child of Silas Holmes, the testator, died in said District of Columbia on or about the 24th day of December, 1921, leaving her surviving as her only heir at law and next of kin, Lorenzo Allen, her grandson, the defendant named herein, who is also the great grandson of the testator, Silas Holmes; that under items four (4) and five (5) of the will of the testator, Silas Holmes, it was directed as follows:

"Item 4. That upon the decease of my wife and daughter, the latter leaving issue her surviving, who are minors, all of said above described real estate remaining unsold, as hereinafter provided, shall be sold by the then executor of my last will, under the authority of the Orphans' Court of the District of Columbia, and the proceeds thereof, invested under the orders of said Court, and the interest arising from said investment applied to the support of said minor children of my said daughter, and the principal, upon said children arriving at the majority of the youngest of them shall be divided into and paid to them in equal shares, after deducting from said principal one thousand dollars of said sum which I hereby give, devise and bequeath to my nephew and adopted son Walter Holmes.

"Item 5. If after the decease of my said wife, my daughter shall die without leaving issue surviving, then and in that case, I will, devise and bequeath all of said property, to the said nephew and adopted son, Walter Holmes, and to my brothers and sisters then living, or to their heirs, if deceased, in equal shares."

That defendant further avers that the said Virginia Allen died on or about the 24th day of December, 1921, leaving her surviving one grandchild, the defendant herein Lorenzo Allen, as her only heir at law and next of kin, whose father, the only son of the said Virginia Allen, died during [fol. 13] her lifetime; that the said last will and testament of the said Silas Holmes, the testator, was admitted to probate and record on or about the 18th day of February, 1898; that the said defendant, Lorenzo Allen, thus became possessed as the owner of the property mentioned in plaintiffs' declaration under items four (4) and five (5) of the last will and testament of the testator, Silas Holmes, as the great grandchild of said testator being the grandchild of Virginia Allen, daughter of the testator as her only heir at law and next of kin; that on or about the 5th day of October, 1923, the defendant being then a minor, an order was passed appointing a guardian for said defendant, for the purpose of conserving his interest and accounting to the court for the receipts and expenditures connected with the property referred to in plaintiffs' declaration; the guardianship referred to herein was duly accomplished, and the affairs of the defendant, then a minor, duly administered, according to the rules of the Probate Court, and the final account, filed on or about the 4th day of May, 1925, when the residue of the personal estate and the control of the real estate were turned over to said defendant named, he having then become twenty-one (21) year- of age; that on or about the 10th day of August, 1922, a bill in Equity No. 40-408, was filed by one Thomas Walker, naming as defendants, all the plaintiffs in the declaration, as well as the defendant herein, for the purpose of determining who was entitled to a certain sum of money, which he, the said Thomas Walker had collected as rents from some of the property referred to in said declaration; that in the course of the proceeding, sections four (4) and — (5) of the last will and testament

of the testator, Silas Holmes were submitted to the court for interpretation, and a decree was entered in said Equity cause, to the effect that the defendant, Lorenzo Allen, was not entitled to the property mentioned in said paragraphs 4 and 5 of the will of the said Silas Holmes, the testator; defendant further avers that from the decree entered in said Equity cause No. 40-408, an appeal was duly noted, the same has been perfected, and is now calendared in the Court of Appeals, District of Columbia, numbered 4426; that the subject-matter of the declaration, filed on behalf of the plaintiffs in this cause has been transferred from the [fol. 14] jurisdiction of the Supreme Court of the District of Columbia to the Court of Appeals for final determination, and this the said defendant is ready to verify; wherefore he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action against him.

To which plea the plaintiffs on June 30, 1926, filed a demurrer and motion to strike, as follows:

The plaintiff moves to strike from the files the first plea of the defendant filed herein on the ground that it is a general issue plea and that general issue pleas have been abolished by rule of this Honorable Court

And the plaintiff says that the defendant's second plea is bad in substance.

Among the matters of law intended to be argued upon this demurrer are the following:

a. Under the proper construction of the will recited in said plea the defendant acquired no right, title or interest thereunder in and to the real estate involved in these proceedings.

b. It is not alleged in said plea that upon the appeal therein recited a supersedeas bond was given.

c. It is not alleged in said plea that the right to possession of the real estate involved in these proceedings was one of the matters before the Court for decision.

On July 2, 1926, the said demurrer and motion to strike was sustained with leave to the defendant to amend,

On July 9, 1926, the defendant filed two amended pleas, as follows:

1. Defendant says that the plaintiffs are not entitled to the fee and the right of possession of the property men-

tioned in their declaration, but that the defendant named herein is entitled to the ownership in fee simple of said property and the possession thereof; that the plaintiffs were never lawfully nor actually possessed of said property on the day and date mentioned in said declaration, nor upon any other day or date, and that the defendant did not wrongfully enter into possession of said property, nor did he wrongfully or otherwise eject said plaintiffs from the possession thereof.

[fol. 15] 2. Defendant further says that he is now in possession of said property and of the fee simple title thereto, and has been lawfully so possessed thereof since the 24th day of December, 1921, without interruption to said possession from that date to the present time, and that the right of the defendant to retain title to and possession of said property is now before the Court of Appeals of the District of Columbia for a final decision.

On July 17, 1926, plaintiff filed a demurrer and motion to strike the amended pleas upon the following grounds:

Come now the plaintiffs by their attorneys and move this Honorable Court to strike from the files the amended pleas filed herein upon the ground that said amended pleas are not accompanied by a list of the deeds, proceedings, or other documents relied upon as constituting defendant's chain of title, together with a reference to the place of record of each, if recorded, as required by Common Law Rule 30 of this Honorable Court.

And the plaintiffs say that said amended pleas are bad in susbtance.

Among the matters of law intended to be argued are the following:

1. It is not necessary for the plaintiffs to have alleged, nor that they shall prove that they, or any of them, were actually possessed of the property mentioned in the declaration.

2. The defendant's amended pleas except in so far as they deny plaintiffs' actual possession of said property, consist of the defendant's conclusions of law and do not set up allegations of fact.

3. The first of said amended pleas contains negatives pregnant.

4. The second of said amended pleas does not state what proceeding in the Court of Appeals is there referred to, nor who the parties to such proceedings were.

On July 20, 1926, plaintiffs' demurrer to the amended pleas was sustained and the defendant electing to stand on his amended pleas, judgment for the possession of the property was entered against him and an inquisition ordered as to rents.

[fol. 16] On August 16, 1926, a jury was sworn and verdict was rendered for plaintiffs against the defendant for $1,686.46, mesne profits of said real estate, and on August 21, 1926, judgment was entered upon said verdict.

On August 4, 1926, a writ of possession was issued by the Court directing the Marshal of the District of Columbia to deliver possession of the property to the plaintiffs according to their recovery thereof, and on August 6, 1926, the Marshal returned said writ to the Court stating thereon that he had delivered possession to the plaintiffs on August 6, 1926 as directed.

Plaintiff here says that notwithstanding the matters aforesaid, the Court of Appeals of the District of Columbia on January 3, 1927, by its mandate [illegible] in said equity cause No. 40,408, on September 16, 1927, directed, upon plaintiffs' perfected appeal from the aforesaid decree in said equity cause, dated July 24, 1925, the reversal of the aforesaid decree of July 24, 1925, and remanded the cause to this Honorable Court for further proceedings not inconsistent with its opinion. The material part of said opinion being as follows:

We conclude that neither of the devises contained in items 4 and 5, respectively, ever became operative. The first one failed because testator's daughter died without leaving minor children surviving her, the second failed because testator's daughter died leaving issue, to wit, her grandson, surviving her. The testator therefore died intestate as to the real estate. The decree of the lower court is accordingly reversed, and the cause is remanded for further proceedings not inconsistent herewith. Costs to be paid out of the assets of the estate.

And plaintiff says that thereupon this honorable Court in said equity cause, on May 27, 1927, entered its final decree pursuant to said mandate vacating its said decree of July 24, 1925; said decree of May 27, 1927, being as follows:

This cause came on to be further heard upon the mandate of the Court of Appeals of the District of Columbia, filed herein on the 16th day of February, 1927. Thereupon it is, this 27th day of May, A. D. 1927,

[fol. 17] Adjudged, ordered and decreed as follows:

1. That the decree entered herein on the 24th day of July, A. D. 1925, be, and the same is hereby vacated, set aside and for nothing held;

2. That the true interpretation of the Will of Silas Holmes, deceased, mentioned in the bill of complaint, is that upon the death of said decedent's daughter, Virginia Allen, without leaving child her surviving, the said will became inoperative as to the real estate therein described and the said testator therefore died intestate as to the said real estate;

3. That the fee of the Guardian ad Litem herein be, and the same is hereby fixed at One Thousand Dollars ($1000.00);

4. That the balance of the fund which is the subject matter of this suit, and which is now on deposit in the registry of this Court, be paid to the defendant Lorenzo Allen, as the sole heir at law of the aforesaid testator, after deducting therefrom any unpaid court costs herein incurred by the parties to this suit.

Therefore plaintiff says that even if the defendants here did recover title and possession of the property involved herein by virtue of the proceedings in said ejectment suit, at law, No. 71,594, as aforesaid, and as alleged by the substituted — in their said pleas, and thus established as between the parties hereto the title of the property and possession thereof on August 6, 1926, nevertheless he is entitled to prosecute this suit for the recovery of said property, and that the pleas of the substituted defendants filed to his declaration on January 19, 1928, aforesaid, constitute no legal defense thereto because of the matters aforesaid and because of the decree aforesaid passed in said equity cause on May 27, 1927, pursuant to the mandate of the Court of Appeals.

Alvin L. Newmyer, George C. Gertman, Attorneys for Plaintiff.

[fol. 18] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

ORDER APPOINTING GUARDIAN AD LITEM FOR INFANTS—January 20, 1930

Session resumed pursuant to adjournment, Hon. Jennings Bailey, Justice, presiding.

* * * * * * *

It appearing that the defendants Lillian H. M. Redding and Margaret M. Redding, in each of the above-entitled causes are infants and that no plea or answer has been filed in their behalf, it is ordered that Wilmer J. Latimer, Esqr., be, and he is hereby, in each of said causes appointed guardian ad litem to appear for and plead or answer in their behalf and to represent their interests.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ANSWER OF INFANT DEFENDANTS BY GUARDIAN AD LITEM—Filed February 18, 1930

* * * * * * *

For answer to the declaration filed herein the defendants Lillian M. H. Redding and Margaret M. Redding, by their guardian ad litem, heretofore duly appointed herein, say that said defendants are infants and, therefore, are unable to make other answer thereto than to submit their interests in this suit to the protection of this Honorable Court.

Lillian M. H. Redding, Margaret M. Redding, by J. Wilmer Latimer, Guardian ad Litem.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

DEMURRER TO PLAINTIFF'S REPLICATION—Filed February 18, 1930

* * * * * * *

The defendants Keziah Reed, Thomas Johnson, Annie Goodwin, James T. Holmes, Joseph E. Holmes, Lillian

Holmes (now Lilian Holmes Redding), Jennie B. Golds-
[fol. 19] borough, Jesse V. Holmes, Etta Lockwood, Georgiana R. Simpson, James R. Simpson, Virginia Robinson, Randolph Thompson, Mary L. Day, Henry Thompson, Sampson Thompson, Benjamin Mabry, Lewis H. Redding, Louis L. Redding, Cora G. Redding and James T. S. Redding, say that the plaintiff's replication is bad in substance.

The matter of law intended to be argued is that the judgment in the action in ejectment No. 71594 At Law, wherein the present plaintiff was defendant and the defendants in the present suit were plaintiffs, being the same judgment pleaded in the first plea of these defendants herein, was and is conclusive as to the right of possession of these defendants to the real estate mentioned and described in the declaration herein.

Walter C. Clephane, J. Wilmer Latimer, Gilbert L. Hall, Attorneys for Defendants.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

MEMORANDUM OPINION—Filed April 7, 1930, as of March 28, 1930

* * * * * * * * *

I do not think that the plaintiff sets up any title in the present suit acquired since the former suit and which he did not have at that time, and which he might have asserted then. He failed to appeal from the former judgment and cannot now set up any title which he had at that time.

The demurrer to the replication will be sustained.

Bailey, J.

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

ORDER SUSTAINING DEMURRER—April 1, 1930

By order of Honorable Jennings Bailey, Justice of the Supreme Court of the District of Columbia, presiding, this court is opened by proclamation of the United States Marshal pursuant to Rule of Court.

* * * * * * * * *

Upon consideration of the demurrer filed herein to plaintiff's replication, it is ordered that the same be and it is [fol. 20] hereby sustained. (An exception is noted at request of attorneys for the plaintiff.)

In Supreme Court of District of Columbia

Supplemental Stipulation—Filed April 7, 1930

* * * * * * *

It is hereby stipulated and agreed by and between the attorneys of record herein for the plaintiff and for the defendants and the Guardian ad Litem for the infant defendants, as follows:

1. That the adult defendants' demurrer to the plaintiff's replication to the defendants' plea in bar is adopted by the Guardian ad Litem as a plea in behalf of the infant defendants; also that the order of the Court sustaining said demurrer shall apply, with equal force, to, and enure to the benefit of the infant defendants, and that subsequent proceedings and orders herein shall, except when otherwise stated, bind or enure to the benefit of said infants, as the case may be.

2. That further action in Law No. 74,482, being an ejectment suit solely between the parties hereto and involving the identical issues as are present here but which affects another piece of real estate which was involved in suit at Law No. 71,594, shall be stayed until the ultimate disposition of this action, whereupon the same judgment shall be entered and executed therein as shall be entered and executed in this action.

3. That a copy hereof be filed in suit at Law No. 74,481.

Alvin L. Newmyer, George C. Gertman, Attorneys for Plaintiff. Clephane & Latimer, Attorneys for Defendants. J. Wilmer Latimer, Guardian ad Litem.

Dated this 7th day of April, 1930.

[fol. 21] IN SUPREME COURT OF THE DISTRICT OF COLUMBIA

JUDGMENT—April 7, 1930

Session resumed pursuant to adjournment, Hon. Jennings Bailey, Justice, presiding.

* * * * * * *

Comes now the plaintiff by his attorneys of record and elects to stand upon his replication filed herein and to which a demurrer was sustained by this court on April 1st, 1930, and thereupon it is ordered that judgment be entered.

Wherefore, it is considered that plaintiff take nothing by this action, that defendants go hence without day, be for nothing held and recover of the plaintiff their costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment the plaintiff by his said attorneys, in open court, notes an appeal to the Court of Appeals; whereupon, the maximum of an undertaking for costs is hereby fixed in the sum of One Hundred Dollars.

MEMORANDUM—April 11, 1930

Cost bond on appeal ($100.00) approved and filed.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENTS OF ERROR—Filed April 18, 1930

* * * * * * *

Plaintiff assigns the following errors committed by the trial justice:

1. In sustaining the defendants' demurrer to the plaintiff's replication to the defendants' plea in bar to the declaration.

2. In entering final judgment against the plaintiff in this cause upon said demurrer.

3. In dismissing plaintiff's cause of action upon said demurrer.

A. L. Newmyer, George C. Gertman, Attorneys for Plaintiff.

[fol. 22] Service of copy of the aforegoing Assignment of Errors is acknowledged this 18th day of April, 1930.

Clephane & Latimer, Attorneys for Defendants. J. Wilmer Latimer, Guardian ad Litem for Infant Defendants,

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IN SUPREME COURT OF DISTRICT OF COLUMBIA

DESIGNATION OF RECORD—Filed April 18, 1930

* * * * * * *

The Clerk will please include the following in the record on plaintiff's appeal in the above entitled cause:

1. Declaration.
2. Motion of Keziah Reed, et al., to be substituted as defendants.
3. Minute entry of granting of above motion.
4. Plea of substituted defendants filed January 16, 1928, and list of documents relied upon attached thereto.
5. Stipulation filed on January 16, 1930.
6. Plaintiff's replication filed January 16, 1930 to defendants' plea.
7. Minute entry of January 20, 1930 appointing Guardian ad Litem for infant defendants.
8. Answer of infant defendants through their Guardian ad Litem to the declaration.
9. Demurrer by the adult defendants to the plaintiff's replication.
10. Memorandum opinion of the Court, filed March 28, 1930—April 7, 1930.
11. Minute entry of the ruling of the Court sustaining the demurrer to the plaintiff's replication and plaintiff's exception noted thereto.
12. Stipulation between Counsel for plaintiff and the adult defendants and the Guardian ad Litem.
13. Minute entry of the plaintiff's election to stand upon his said replication notwithstanding the sustaining of the demurrer thereto, the entry of the judgment by the Court for the defendants, the noting of an appeal by the plaintiff in open Court, the fixing of the cost bond of $100.00 and the date of the filing and approval thereof.

[fol. 23] 14. Assignment of errors.
15. This designation.

A. L. Newmyer, George C. Gertman, Attorneys for Plaintiff.

Service of copy hereof accepted this 18th day of April, 1930.

Clephane & Latimer, Attorneys for Defendants. J. Wilmer Latimer, Guardian ad Litem for Infant Defendants.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 24] Minute entry of argument and submission, November 9, 1931, omitted in printing.

[fol. 25] IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 5246

LORENZO ALLEN, Appellant,

v.

KEZIAH REED, THOMAS JOHNSON, ANNIE GOODWIN, JAMES T. Holmes, Joseph E. Holmes, Lillian Holmes, Jennie B. Goldsborough, Jesse V. Holmes, Etta Lockwood, Georgiana R. Simpson, James R. Simpson, Virginia Robinson, Randolph Thompson, Mary L. Day, Henry Thompson, Sampson Thompson, Benjamin Mabry, Lewis H. Redding, Louis L. Redding, Cora G. Redding, James T. S. Redding, Lillian M. H. Redding, Infant, by Her Next Friend, Lewis H. Redding; Margaret M. Redding, Infant, by Her Next Friend, Lewis H. Redding, Appellees

Appeal from the Supreme Court of the District of Columbia

Argued November 9, 1931. Decided Dec. 7, 1931

Alvin L. Newmyer, and George C. Gertman, both of Washington, D. C., for appellants.

J. Wilmer Latimer, guardian ad litem for infant appellees, Walter C. Clephane, Gilbert L. Hall, all of Washington, D. C., for appellees.

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices

OPINION

VAN ORSDEL, Associate Justice:

This appeal is from a judgment of the Supreme Court of the District of Columbia in an ejectment proceeding. The real estate involved in this case was part of the estate of one Silas Holmes, who died November 11, 1892. The appellant here is the testator's great grandson and next of kin, while the appellees are his brothers and sisters and the descendants of brothers and sisters.

In 1922 litigation arose over the rents derived from the property, which called for a construction of the will. On hearing a decree was entered by the court below adjudging the present appellees entitled to the rents and profits. From that decree, the present appellant took an appeal. During the pendency of the appeal, and in the absence of a supersedeas bond, the appellees instituted an action in ejectment against the appellant wholly based on the decree then on appeal, and before the case was determined on appeal, a judgment in favor of appellees was entered, from which no appeal was taken.

[fol. 26] In January, 1927, this court (57 App. D. C. 78) reversed the decree of the court below and remanded the case with instructions to enter a decree in favor of the present appellant. Appellant then brought the present action in ejectment against the appellees, basing his title to the property and right to possession upon the decree entered in accordance with the mandate of this court. Appellees pleaded the former judgment in ejectment in bar. Appellant replied alleging that since the former judgment he had acquired a new and different title from that asserted in the former ejectment proceeding. Appellees demurred to the replication and the demurrer was sustained. Appellant elected to stand upon his replication and judgment was entered for the appellees. From this judgment the present appeal was prosecuted.

There is nothing especially sacred about a judgment in ejectment, nor anything exceptional that does not apply to judgments in general. Section 1002 of the code provides as follows:

"Any final judgment rendered in an action of ejectment shall be conclusive as to the title thereby established as between the parties to the action and all persons claiming under them since the commencement of the action."

It will be observed that this relates to final judgments. A judgment appealed from is not a final judgment. It is merely an adjudication of the inferior court, the finality of which depends upon the action of the superior court. Until the decree upon which the judgment in the first ejectment suit was based, was disposed of on appeal, it was not a final judgment and was not therefore conclusive upon the parties on the question of title. Title remained suspended pending the appeal.

The judgment in the first ejectment proceeding was dependent entirely upon the title acquired through the decree of the Supreme Court of the District of Columbia. But that decree, on appeal, was reversed and therefore became void. It conveyed no title whatever upon which the parties could base their action for possession. As the court said in Golde Clothes Shop v. Loew's Buffalo Theatre, 236 N. Y. 465, 470:

"We are told that the defendant rested upon an order of a court. The prop was insecure, and warning was not lacking of the danger of collapse. When the order was reversed and the proceeding dismissed, rights and duties were reestablished, inter partes, as if no order had been made * * *."

In that case a landowner had been let into possession under a warrant in a summary proceeding and proceeded to tear down buildings and erect valuable improvements on the land pending appeal. The order was reversed and ejectment proceedings brought against the tenant. It was held that there was not even an equitable defense to the action.

The decree based upon the mandate of this court was the first and only final decree upon which a judgment in ejectment could be based. The first ejectment suit was merely

in aid of the first decree. When that decree was reversed, "vacated, set aside, and for nothing held," the judgment for possession shared the fate of the decree upon which reliance was placed for title. It is elementary that when a judgment, order, or decree is set aside, a dependent judgment or proceeding based upon it for its validity shares its fate and falls with it. (4 C. J. p. 1205; Ure v. Ure, 223 Ill. 454; Dodson v. Butler, 101 Ark. 416, 420.)

[fol. 27] The reversal of a judgment or decree places an implied obligation on a party who has received the benefits of the erroneous judgment or decree, to make restitution to the other party for what he has lost. (U. S. v. Bank of Washington, 6 Pet. 8, 17.) It was within the power of the equity court, upon the mandate of this court, to have ordered restitution of possession in its decree. Possessing this power, it would be trifling with justice to hold that the court was without power to grant restitution in ejectment.

The judgment is reversed with costs.

Josiah A. Van Orsdel, Associate Justice.

[fol. 28] In Court of Appeals of District of Columbia, October Term, 1931

No. 5246

Lorenzo Allen, Appellant,

v.

Keziah Reed, Thomas Johnson, Annie Goodwin, et al.

Appeal from the Supreme Court of the District of Columbia

Judgment—Dec. 7, 1931

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed with costs.

Per Mr. Justice Van Orsdel, December 7, 1931.

[fol. 29] IN COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Dec. 15, 1931

The Clerk will please prepare a transcript of the record in the above entitled cause, including therein the following:

1. The printed record.
2. Minute entry showing argument.
3. Opinion of the Court.
4. The judgment.
5. This designation.
6. Clerk's certificate.

Walter C. Clephane, J. Wilmer Latimer, Gilbert L. Hall, Attorneys for Appellees.

December 15, 1931.

[File endorsement omitted.]

[fol. 30] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 31] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 25, 1932

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,414. District of Columbia Court of Appeals. Term No. 600. Keziah Reed, Georgiana R. Simpson, Lillian M. H. Redding, etc., et al., petitioners, vs. Lorenzo Allen. Petition for a writ of certiorari and exhibit thereto. Filed December 29, 1931. File No. 36,414.

FILE COPY

FILED
DEC 29 193
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 600

KEZIAH REED, GEORGIANA R. SIMPSON, LILLIAN M. H. REDDING, INFANT, BY HER NEXT FRIEND, LEWIS H. REDDING; MARGARET M. REDDING, INFANT, BY HER NEXT FRIEND, LEWIS H. REDDING, ET AL., PETITIONERS,

vs.

LORENZO ALLEN.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

J. WILMER LATIMER,
Guardian ad Litem for Infant Petitioners, in Propria Persona.
WALTER C. CLEPHANE,
GILBERT L. HALL,
Counsel for Adult Petitioners.

(36,414)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 600

KEZIAH REED, GEORGIANA R. SIMPSON, LILLIAN M. H. REDDING, INFANT, BY HER NEXT FRIEND, LEWIS H. REDDING; MARGARET M. REDDING, INFANT, BY HER NEXT FRIEND, LEWIS H. REDDING, ET AL., PETITIONERS,

vs.

LORENZO ALLEN, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show and represent unto Your Honors that:

1. In June, 1926, your petitioners brought their action in ejectment against respondent, Lorenzo Allen, in the Supreme Court of the District of Columbia (R. 6). Judgment for petitioners was entered in August, 1926 (R. 6). Allen *omitted to pursue his remedy*

by appeal from that final judgment (R. 7) and petitioners were, more than five years ago, put into possion of the real estate involved by the usual process in such cases (R. 16).

2. The statute then and now in force in the District of Columbia declares that

> "Any final judgment rendered in an action of ejectment shall be conclusive as to the title thereby established as between the parties to the action and all persons claiming under them since the commencement of the action" (D. C. Code, Section 1002).

3. In December, 1927, said Lorenzo Allen, who had acquired no new title since the judgment in the former action, brought the present action in ejectment against your petitioners' tenant involving precisely the same real estate (R. 1). Your petitioners, having been substituted for their tenant as parties defendant (R. 5) in accordance with the statute (D. C. Code, Sec. 984). interposed the plea of *res judicata* based upon the aforesaid judgment of 1926 (R. 5). By replication to this plea Allen set forth the proceedings and decree upon mandate of the Court of Appeals in a certain *collateral* equity cause (R. 9-17) hereinafter mentioned. Upon demurrer to the replication (R. 18) petitioners' plea of *res judicata* was sustained (R. 19) and judgment entered in their favor (R. 21). From *this* judgment Allen appealed (R. 21). On December 7, 1931, the Court of Appeals of the District reversed the last-mentioned judgment, and it is this decision of the Court of Appeals which petitioners here seek to have reviewed.

The ground of reversal of this second judgment in ejectment was that the former judgment between the same parties, notwithstanding no appeal was taken from it, did not constitute a bar because of the *later ruling* of the Court of Appeals in the collateral suit above referred to (R. 25-27).

4. The nature of said collateral equity suit and the proceedings therein were as follows:

About nine years ago one Thomas Walker filed in the Supreme Court of the District a bill of interpleader as the custodian of rent-money collected by him from certain real estate (R. 13). Petitioners and respondent Allen were made defendants as the adverse claimants to said rents and required to interplead (R. 10). Upon final hearing, in July, 1925, a decree was entered in favor of petitioners (R. 10, 13). Appeal was taken by Allen and, in January, 1927 (R. 13), the Court of Appeals reversed the decree (R. 16).

The adjudication of the conflicting claims in said equity cause turned (both in the trial and appellate courts) upon the interpretation of the will of one Silas Holmes (R. 13), who, many years before, had died seized of the real estate from which said rents were derived (R. 13). Petitioners, on the one side, and respondent Allen, on the other, claimed the rents in Walker's hands as devisees in remainder under said will (R. 9, 13). The life tenants both had died prior to the filing of said interpleader suit (R. 12).

The real estate from which the said rents were derived is the same real estate which was the subject of litigation in the two ejectment suits aforesaid (R. 6, 9, 13).

5. For the sake of clearness, petitioners here state in sequence the essential events in the three suits hereinbefore described:

July, 1925.—Decree in trial court in petitioners' favor in interpleader suit involving rents; appeal noted and perfected (R. 10, 13).

June, 1926.—Ejectment for possession of real estate instituted by petitioners against Allen (R. 6).

August, 1926.—Judgment for petitioners in ejectment action. *No appeal taken* (R. 6, 7).

August, 1926.—Possession of real estate delivered to petitioners under writ of possession in ejectment suit (R. 16).

January, 1927.—Decision of Court of Appeals reversing *decree in interpleader suit* (R. 16).

May, 1927.—Decree upon mandate of Court of Appeals in interpleader suit (R. 16).

December, 1927.—Ejectment (second action) for possession of same real estate, instituted by Allen (R. 1).

April, 1930.—Judgment for petitioners in second ejectment suit; appeal noted and perfected (R. 21).

December, 1931.—Decision of Court of Appeals reversing judgment in second ejectment suit (R. 24-27).

6. The question here sought to be reviewed by your petitioners is whether the decision on appeal from the judgment in the second ejectment suit, which refuses to recognize and uphold as final and conclusive the judgment entered more than five years before in the first ejectment suit, can be legally sustained.

The Court of Appeals' decision is that, notwithstanding the acquiescence of respondent Allen in the judgment in the first ejectment suit, he is nevertheless *not bound* by it, but may maintain this second ejectment suit because of the intervening ruling of the Court of Appeals in the collateral interpleader suit. In other words, when (through the appellate court's subsequent ruling in a wholly collateral suit) it appears that a final judgment in ejectment, unappealed from and acquiesced in, had been erroneous, the losing party may again litigate the same issue with the same parties in a second ejectment action.

7. The reasons which your petitioners respectfully advance for the granting by Your Honors of the writ of certiorari as herein prayed are:

(1) That the Court of Appeals has decided erroneously a question of great and general importance;

(2) That such decision, if permitted to stand as a precedent will tend to destroy the doctrine of *res judicata* which this Court has declared to be "essential to the maintenance of social order" (*Sou. Pac. R. R.* v. *U. S.*, 168 U. S. 1, 48);

(3) That such decision, if permitted to stand as a precedent, will unsettle long-established law with respect to the conclusiveness of judgments;

(4) That the Court of Appeals has not given effect to, but wholly ignored, applicable decisions of this Court relating to the doctrine of *res judicata*.

WHEREFORE your petitioners pray the allowance of a writ of certiorari to the Court of Appeals of the Dis-

trict of Columbia in this case, there entitled *Lorenzo Allen, Appellant,* v. *Keziah Reed et al., Appellees,* No. 5246, that said cause may be reviewed and determined by this Court, and that the judgment of the said Court of Appeals may be reversed and set aside, and for such further relief and remedy in the premises as this Court may deem meet and proper.

LILLIAN M. H. REDDING,
Infant.

MARGARET M. REDDING,
Infant.

By J. WILMER LATIMER,
Their Guardian ad Litem.

GEORGIANA R. SIMPSON,
For Herself and on Behalf of the Other Adult Petitioners.

WALTER C. CLEPHANE.
GILBERT L. HALL,
Counsel for Adult Petitioners.

BRIEF IN SUPPORT.

Counsel bring this petition with confidence, first, because they believe that the most cursory examination will satisfy the Court that the decision of the Court of Appeals was erroneous, and, second, because that decision refused to recognize the conclusiveness of a judgment and the binding decisions of this Court. If lawyers or laity find that they cannot rely upon the conclusiveness of judgments, they must feel that the foundations of the law are crumbling beneath their feet.

The applicable code provision, quoted in the petition (p. 2), is positive in declaring that a final judgment in ejectment shall be conclusive between the parties. This statute thus abrogated the common-law doctrine which permitted successive ejectment actions between the same parties involving the same issue, and clearly established a contrary rule.

In this case the Court of Appeals has declared a final judgment in ejectment to be of no effect. The reasons given in the Court's opinion (R. 24-27) will be adverted to presently.

Whenever this Court has had occasion to speak of the estoppel by judgment, it has spoken in no uncertain terms. Brief quotations from a few illustrative cases follow:

Johnson Co. v. *Wharton*, 152 U. S. 252:

> "The inquiry as to the conclusiveness of a judgment in a prior suit between the same parties can only be whether the court rendering such judgment—whatever the nature of the

question decided, or the value of the matter in dispute—had jurisdiction of the parties and the subject-matter, and whether the question, sought to be raised in the subsequent suit, was covered by the pleadings and actually determined in the former suit'' (p. 261).

Southern Pacific R. R. Co. v. *U. S.*, 168 U. S. 1:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; * * * This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them'' (p. 48).

Hart Steel Co. v. *Railroad Supply Co.*, 244 U. S. 294:

"This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and private peace', which should be cordially regarded and enforced by the courts to the end that rights once established by the final

> judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect'' (p. 299).

No appeal was taken by respondent Allen from the adverse final judgment in the first ejectment suit (R. 7, 16). In the collateral (interpleader) case, the appellate court's interpretation of the Silas Holmes will was not handed down for many months after the ejectment judgment had been entered and petitioners put in possession. Tested by this later interpretation it may be admitted that the ejectment judgment was erroneous. But that does not at all affect its finality and conclusiveness. As this Court said in *State of Oklahoma* v. *State of Texas*, 256 U. S. 70:

> ''The matter being *res judicata*, as the result of the decree in the former suit, it is of no consequence whether it was correctly decided or not'' (p. 93).

It is not necessary to cite decisions of other courts to the effect that the failure to assert rights in a suit in which a judgment is obtained, either through ignorance of law or of facts, or through negligence or misconduct of counsel, does not affect the estoppel, and that, so long as the judgment remains unappealed from and in full force, the fact that it may have been erroneous does not detract from its effect as a bar to further suits upon the same cause of action.

The opinion in *Oklahoma* v. *Texas, supra*, and the following quotations from two other cases in this Court make the above principles clear. In *Wilson's Executor*

v. *Deen*, 121 U. S. 525, which is quite in point on the facts, the Court said:

> "Fraud in procuring the lease, upon which this action is brought, was the point in issue in the action in the marine court between the same parties, and it having been found by the verdict of the jury against the plaintiff, and judgment having been rendered upon that finding, the fact thus established must necessarily defeat any subsequent action upon the same instrument between those parties. The effect of the judgment is not at all dependent upon the correctness of the verdict or finding upon which it was rendered. It not being set aside by subsequent proceedings, by appeal or otherwise, it was equally effective as an estoppel upon the point decided, whether the decision was right or wrong" * * * (p. 534).

and in the earlier case of *Cromwell* v. *County of Sac*, 94 U. S. 351, the Court quoted with approval from *Henderson* v. *Henderson*, 3 Hare 100, as follows:

> "In trying this question, I believe I state the rule of court correctly, that when a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in controversy, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of the case" (p. 358).

Brief references will be made now to the grounds stated in the opinion of the Court of Appeals for the ruling which is here sought to be reviewed.

1. Strangely, the appellate court treats the appeal from the decree in the collateral (interpleader) suit as if it had been an appeal from the judgment in the first action in ejectment, and bases its conclusion upon this supposed fact. It said in its opinion, after quoting the Code section in question (Petition, p. 2):

> "It will be observed that this relates to final judgments. *A judgment appealed from is not a final judgment.* It is merely an adjudication of the inferior court, the finality of which depends upon the action of the superior court" (R. 26). (Italics ours.)

Any reader of the opinion (R. 24-27) would almost certainly infer from this that there had been an appeal from the first ejectment judgment. But it has already been shown by the record that *there was no appeal taken* (R. 7, 16).

2. The appellate court falls into the further error of treating the decree in the interpleader suit as a *decree vesting title* to the real estate.

That the interpleader decree *did not* create or vest title to the real estate is obvious. The only possible authority of the Court in the interpleader suit was to determine who was entitled to the money in Walker's hands. This involved the interpretation of Silas Holmes' will for the purpose of ascertaining in whom was the title in remainder, for such remainderman was clearly entitled to rent-money collected by Walker

after the life tenant's death. The trial court's construction of the will gave the money to petitioners as devisees under the will (R. 10). The appellate court's construction gave it to respondent Allen as heir-at-law (R. 16). In either view the *title to the land must have vested at the testator's death* (which occurred about 30 years before—R. 13) or as soon after his death as the claimants came into being. Therefore the equity court could not have vested title to the land by its decree in the interpleader suit, and the fact is that neither the first decree (R. 10) nor the decree upon mandate (R. 16, 17) attempted to do so.

It is thus made evident that the appellate court was entirely in error in declaring in its opinion that:

> "The judgment in the first ejectment proceeding was dependent entirely upon the *title acquired through the decree* of the Supreme Court of the District of Columbia" (R. 26). (Italics ours.)

3. The third fundamental error of the appellate court is closely related to the second. It is that the appellate court predicated its decision upon the unjustified premise that petitioners had *based their ejectment action upon the trial court's decree* in the interpleader suit. The opinion, in stating the case, says (R. 25) that petitioners "instituted an action against the appellant *wholly based on the decree* then on appeal." (Italics ours.) Throughout the opinion are other frequent references to the same supposed fact, and it is plain from the court's language that it regarded such supposed fact as a controlling one.

But the record shows that petitioners' ejectment action was based, as of course it must have been, upon the title which they had long asserted *as devisees under the Silas Holmes will* (R. 9). Manifestly the judgment therein could not have been based, nor in any way dependent, upon a decree which vested *no title* to the real estate in them. Respondent Allen's replication in the present action (upon which he elected to stand after demurrer was sustained) avers that in the former ejectment action petitioners "as their source of title and right to possession relied solely" upon Silas Holmes' will, and upon the trial court's decree in the interpleader suit (R. 9). This is the only statement in the record upon this subject and it shows that the present petitioners there asserted and relied upon a *title derived from the will* and very properly availed themselves of the interpretation given the same will by a justice of the same court in a collateral proceeding in which the will had also been involved. *But even if petitioners in that action had erroneously relied upon the trial court's decree in the collateral suit, as their source of title, respondent could not by a second action in ejectment attack the erroneous judgment from which he omitted to appeal.*

4. The appellate court further, in its opinion, says that:

> "The first ejectment suit was merely *in aid of the first decree*" (R. 26). (Italics ours.)

and also:

> "When that decree was reversed, 'vacated, set aside and for naught held', the judgment for

possession shared the fate of the decree upon which reliance was placed for title" (R. 26).

It is impossible to find any justification either in the record or in the law for declaring that this common law action in ejectment was or could have been in aid of the decree for the payment of money in the interpleader suit.

5. The appellate court's opinion concludes thus:

> "It was within the power of the equity court upon the mandate of this court to have ordered restitution of possession in its decree. Opposing this power it would be trifling with justice to hold that the court was without power to grant restitution in ejectment" (R. 27).

But, it may be asked, what possible power or jurisdiction had the equity court, in the collateral interpleader suit over money, to enter any order or decree which could disturb the final judgment long before entered by the law court in ejectment, or the possession of the real estate which had been secured by that judgment? Of course, upon the reversal of the equity decree, the trial court could and would have required the prevailing parties below to surrender the money, which alone was the subject of that suit, had such money been paid to them pending the appeal.

As indicated by the foregoing quotations from the appellate court's opinion, it wholly ignored the distinct nature of the remedies invoked in the ejectment action and the interpleader proceeding, respectively, and the exclusive character of the jurisdiction in such cases. Because in both it happened that the interpre-

tation of the same will was involved, the appellate court fell into the fundamental error of treating the judgment in the one case as dependent upon the decree in the other. The following apt language quoted by this Court in *Watson* v. *Jones*, 13 Wall. 679, which was directly called to the appellate court's attention in petitioners' brief there, should have prevented any such confusion:

> "It is not true that a court, having obtained jurisdiction of a subject matter of suit and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and in some instances requiring the decision of the same question exactly. In examining into the exclusive character of the jurisdiction in such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits" (p. 716).

The only ground upon which respondent Allen sought to avoid the bar of the former judgment was that he had *acquired a new title* since the first ejectment judgment (R. 25) *by virtue of the decree upon mandate of the appellate court in the interpleader suit*. The learned *trial* justice in his memorandum opinion rejected this contention, saying:

> "I do not think that the plaintiff sets up any title in the present suit acquired since the former suit * * * He failed to appeal from the former judgment and cannot now set up any title which he had at that time" (R. 19).

With that conclusion the appellate court disagreed, holding that the decree upon its mandate in the interpleader suit over the rent money (R. 17) *constituted a new title* to the real estate in Allen! It has already been shown that such could not have been the effect of said decree, and reference to its terms (R. 17) will show clearly that it did not *attempt to vest or create* title to the land in anyone.

To further test the main question here involved, suppose petitioners' ejectment action had been instituted after (instead of long before) the ruling by the Court of Appeals in the interpleader suit, and that the trial court had erroneously given judgment for petitioners notwithstanding that ruling, what would have been respondent Allen's remedy? Obviously his only remedy would have been an appeal from that judgment. He could not acquiesce therein and later on institute a second ejectment suit because of the error in entering the prior judgment.

The case made by the record comes simply to this: Respondent Allen had his day in court in the first ejectment action. He had a plain legal remedy by appeal from the adverse final judgment therein and omitted to avail himself of it. By the decision here sought to be reviewed the Court of Appeals has given him a remedy which is opposed to settled principles repeatedly declared by this Court, as well as to the terms of an unambiguous statute.

If we are not mistaken in our view that the decision is wrong, that it contradicts the plainest decisions of this Court, and that it tends to weaken if not to destroy one of the fundamentals of the law, then the fact

that the decision was by a unanimous court only makes the situation the more serious and calls the more loudly for the intervention of this Court.

In conclusion, it is respectfully submitted that the uncertainty as to the conclusiveness of judgments which would inevitably follow if the appellate court's decision in the present case is allowed to stand, justifies petitioners in praying this review by your Honors.

J. WILMER LATIMER,
Guardian ad Litem for Infant Petitioners, in Propria Persona.
WALTER C. CLEPHANE,
GILBERT L. HALL,
Counsel for Adult Petitioners.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 600

KEZIAH REED, GEORGIANA R. SIMPSON, LILLIAN M. H. REDDING, INFANT, BY HER NEXT FRIEND, LEWIS H. REDDING; MARGARET M. REDDING, INFANT, BY HER NEXT FRIEND, LEWIS H. REDDING, ET AL., PETITIONERS,

vs.

LORENZO ALLEN.

BRIEF FOR THE PETITIONERS.

J. WILMER LATIMER,
Guardian ad Litem for Infant Petitioners, in Propria Persona,
WALTER C. CLEPHANE,
GILBERT L. HALL,
Counsel for Adult Petitioners.

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vs.

LORENZO ALLEN.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE PETITIONERS.

Opinion Below.

The opinion of the Court of Appeals will be found at pages 22 to 25 of the record. Thus far it has been reported only in 60 Wash. Law Rep., at page 36.

Jurisdiction.

The judgment of the Court of Appeals was entered December 7, 1931 (R. 25). The petition for writ of certiorari was filed December 29, 1931, and was granted January 25, 1932 (R. 26). The jurisdiction of this Court rests upon Section 240 (*a*) of the Judicial Code as amended by the Act of February 13, 1925.

The grounds upon which this Court's jurisdiction was invoked (Petition, p. 5) are:

1. That the Court of Appeals has decided erroneously a question of great and general importance.

2. That said decision, if permitted to stand as a precedent, will unsettle and tend to destroy long-established law with respect to the conclusiveness of judgments.

3. That the Court of Appeals has not given effect to, but has wholly ignored, applicable decisions of this Court relating to the doctrine of *res judicata*.

Question Presented.

Whether a final judgment in ejectment constitutes a bar, under the statute in force in the District of Columbia, to the prosecution of a later action of ejectment between the same parties involving the same issue.

Statute Involved.

The statute involved is Sec. 1002 of the Code of Law of the District of Columbia, quoted at page 6, *infra*.

Statement of the Case.

In an action of ejectment, brought by respondent against petitioners,* the Supreme Court of the District gave judgment against respondent (R. 20) on the ground that the action was barred by a previous judgment in ejectment, between the same parties, in favor of the petitioners (R. 18). The Court of Appeals, however, held that the previous judgment was *not* a bar (R. 22-25), and accordingly reversed the decision (R. 25). It is this judgment of the Court of Appeals which is now to be reviewed. From the previous judgment in ejectment *no appeal was taken* (R. 6, 23); and petitioners were put into possession of the land there (and here) involved under the appropriate writ (R. 15). They have remained in possession ever since (R. 6, 7).

The facts of the instant case are presented by the pleadings. To the declaration (R. 1, 2) the defendants (petitioners here) pleaded the former proceedings and judgment (R. 5, 6). The plaintiff (respondent here) replied certain facts (R. 8-16), and the defendants demurred (R. 17, 18). The demurrer having been sustained in the trial court (R. 18, 19), the plaintiff elected to stand on his replication (R. 20).

The facts set up in the replication (R. 8-16) are, in substance: that, before the first action in ejectment, a

---

* Suit was started against petitioners' tenant, but petitioners were promptly substituted as defendants, under Sec. 984, D. C. Code (R. 4, 5).

bill of interpleader had been filed by one Walker as plaintiff against the petitioners, on the one hand, and the respondent, on the other, as defendants making adverse claims to certain moneys in his hands, being rents out of the land later involved in the two ejectment suits (R. 12); that the defendants were required to interplead (R. 9) and each party claimed the rent moneys as owner of the land under a certain will mentioned below; that in the trial court the petitioners had a decree (R. 9, 10), but in the Court of Appeals the respondent was held entitled to said moneys as heir at law (R. 15), and a mandate was sent down accordingly (R. 15); that the first action of ejectment was begun (R. 5) and concluded (R. 6) after the decree in the lower court (R. 10) and before the judgment in the upper court (R. 15).

The will above referred to was that of one Silas Holmes who died prior to 1898 (R. 12), seized and possessed of the real estate in question. He devised it to certain life tenants (R. 11, 12), and, following the death of the last of these, the controversies arose between petitioners and respondent which resulted in the suits above described (R. 12-16).

Although it is believed that the above statement is sufficient to present the only question of law involved, yet in the interest of perfect clearness the essential events in the three suits are here mentioned in chronological order:

July, 1925.—Decree in trial court in petitioners' favor in interpleader suit involving rents; appeal noted and perfected (R. 9, 10).

June, 1926.—Ejectment for possession of real estate instituted by petitioners against respondent (R. 5).

August, 1926.—Judgment for petitioners in ejectment action. *No appeal taken* (R. 6, 23).

August, 1926.—Possession of real estate delivered to petitioners under writ of possession in ejectment suit (R. 15).

January, 1927.—Decision of Court of Appeals reversing decree in interpleader suit (R. 15).

May, 1927.—Decree upon mandate of Court of Appeals in interpleader suit (R. 15, 16).

December, 1927.—Ejectment (second action) for possession of same real estate, instituted by respondent (R. 1).

April, 1930.—Judgment for petitioners in second ejectment suit; appeal noted and perfected (R. 20).

December, 1931.—Decision of Court of Appeals reversing judgment in second ejectment suit (R. 22-25).

Grounds of Appellate Court's Decision.

Upon a careful reading of the opinion of the Court of Appeals (R. 22-25) it is difficult to say what, exactly, is the real ground of the decision, but it would appear to be, primarily, that the judgment of that court in the interpleader suit constituted a new title to the land in the respondent, and, secondarily, that the judgment in the first ejectment action, *although not appealed from*, could not be a final judgment until the Court of Appeals had passed upon the same question of law in the collateral interpleader suit. An analysis of the opinion will be found at pages 13 to 17, *infra*.

Specification of Error.

The Court of Appeals erred in holding that the judgment in petitioners' favor in the first ejectment suit did not constitute a bar to the prosecution by respondent of the second ejectment suit.

ARGUMENT.

The common law doctrine which permitted successive ejectment actions between the same parties involving the same issue has been abrogated by the following provision of the D. C. Code:

> "Any final judgment rendered in an action of ejectment shall be conclusive as to the title thereby established as between the parties to the action and all persons claiming under them since the commencement of the action" (Section 1002).

Of a similar statute this Court said, in *Barrows* v. *Kindred*, 4 Wall. 399:

> "When the Legislature of any State has seen fit to divest the action of ejectment of its ancient characteristics, and to place it upon the same footing with other actions, we have not failed to give full effect to the legislative intent by maintaining the conclusiveness of the judgment, as in other cases." (p. 403)

In the present case the Court of Appeals has declared a final judgment in ejectment to be of no effect, notwithstanding the plain terms of the above statute and the applicable decisions of this Court hereinafter

cited. The reasons given in the appellate court's opinion. (R. 22-25) are presently to be adverted to (*infra.* pp. 13 to 17).

Whenever this Court has had occasion to speak of the estoppel by judgment, it has spoken in no uncertain terms. Brief quotations from a few illustrative cases follow:

Johnson Co. v. *Wharton,* 152 U. S. 252:

> "The object in establishing judicial tribunals is that controversies between parties, which may be the subject of litigation, shall be finally determined. The peace and order of society demand that matters distinctly put in issue and determined by a court of competent jurisdiction as to parties and subject-matter, shall not be retried between the same parties in any subsequent suit in any court. The exceptions to this rule that are recognized in cases of judgments obtained by fraud or collusion have no application to the present suit" (p. 257). * * *
>
> "The inquiry as to the conclusiveness of a judgment in a prior suit between the same parties can only be whether the court rendering such judgment—whatever the nature of the question decided, or the value of the matter in dispute—had jurisdiction of the parties and the subject-matter, and whether the question, sought to be raised in the subsequent suit, was covered by the pleadings and actually determined in the former suit." (p. 261)

Southern Pacific R. R. Co. v. *U. S.,* 168 U. S. 1:

> "The general principle announced in numerous cases is that a right, question or fact dis-

> tinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; (p. 48) * * * This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them." (p. 49)

Fayerweather v. *Ritch*, 195 U. S. 276:

> "Private right and public welfare unite in demanding that a question once adjudicated by a court of competent jurisdiction shall, except in *direct proceedings to review*, be considered as finally settled and conclusive upon the parties." (p. 299) (Italics supplied.)

Hart Steel Co. v. *Railroad Supply Co.*, 244 U. S. 294:

> "This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction

> shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect." (p. 299)

A very recent expression of this Court upon the subject is in *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522, where the facts were that a corporation, sued in the United States District Court of Missouri, had entered a special appearance and moved to dismiss on the ground of the lack of jurisdiction of that court over the person of the defendant. Its motion was overruled and, upon failure to plead, judgment was entered against it. The corporation sought no review of the judgment. Later, suit upon the judgment was brought in the United States District Court of Iowa, and the corporation there pleaded the invalidity of the judgment on the same ground advanced in the former suit—lack of jurisdiction of the District Court of Missouri over the person of the defendant. This Court held that the corporation was estopped by the former judgment, which became final by its failure to move to set it aside or to sue out a writ of error, and said:

> "It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.
>
> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in

> every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." (pp. 525, 526)

The appellate court's interpretation of the Silas Holmes will, in the interpleader suit (R. 15), was not handed down for many months after the first ejectment judgment had been entered and petitioners put in possession (R. 15). The present decision of the Court of Appeals is that, notwithstanding the acquiescence of respondent in the judgment in the first ejectment suit, he is nevertheless *not bound* by it, but may maintain this second ejectment suit because of that intervening ruling of the Court of Appeals in the interpleader suit. In other words, when (through the appellate court's subsequent ruling in a wholly collateral suit) it appears that a final judgment in ejectment, unappealed from and acquiesced in, had been erroneous, the losing party may again litigate the same issue with the same parties in a second ejectment action.

Tested by this later interpretation it may be admitted that the ejectment judgment was erroneous. But that does not at all affect its finality and conclusiveness. As this Court said in *State of Oklahoma* v. *State of Texas*, 256 U. S. 70:

> "The matter being *res judicata*, as the result of the decree in the former suit, it is of no consequence whether it was correctly decided or not." (p. 93)

It is not necessary to cite decisions of other courts to the effect that the failure to assert rights in a suit in which a judgment is obtained, either through ignorance of law or of facts, or through negligence or misconduct of counsel, does not affect the estoppel, and that, so long as the judgment remains unappealed from and in full force, the fact that it may have been erroneous does not detract from its effect as a bar to further suits upon the same cause of action.

The opinion in *Oklahoma* v. *Texas, supra,* and the following quotations from other cases in this Court make the above principles clear.

In *Wilson's Executor* v. *Deen,* 121 U. S. 525, which is quite in point on the facts, the Court said:

> "Fraud in procuring the lease, upon which this action is brought, was the point in issue in the action in the Marine Court between the same parties, and it having been found by the verdict of the jury against the plaintiff, and judgment having been rendered upon that finding, the fact thus established must necessarily defeat any subsequent action upon the same instrument between those parties. *The effect of the judgment is not at all dependent upon the correctness of the verdict or finding upon which it was rendered. It not being set aside by subsequent proceedings, by appeal or otherwise, it was equally effective as an estoppel upon the point decided, whether the decision was right or wrong* * * *".
> (p. 534). (Italics supplied.)

In *Cromwell* v. *County of Sac,* 94 U. S. 351, frequently cited in later decisions of this Court, the opinion, after stating the rule that a judgment rendered

upon the merits constitutes an absolute bar to a subsequent action, continues:

> "It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and of the amount due upon it, *although it be subsequently alleged that perfect defenses actually existed,* of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. *The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed*" (pp. 252, 253). (Italics supplied.)

In *U. S.* v. *Moser*, 266 U. S. 236, the Court said:

> "But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law" (p. 242). (Italics the Court's.)

To same effect:

Elliott v. *Lessee of Peirsol*, 1 Pet. 328, at p. 340.
Chicago, R. I. & P. R. Co. v. *Schendel*, 270 U. S. 611, at p. 617.

So important is the maintenance of the doctrine of *res judicata* that this Court has declared that it must be enforced even when no review of the judgment by appeal was available, because of the small amount involved (*Johnson Co.* v. *Wharton*, 152 U. S. 252).

Brief references will be made now to the grounds stated in the opinion of the Court of Appeals for its ruling in the present case.

1. Strangely, the appellate court treats the appeal from the decree in the collateral (interpleader) suit as if it had been an appeal from the judgment in the first action of ejectment, and bases its conclusion upon this supposed fact. It said in its opinion, after quoting the Code section in question (*supra*, p. 6):

> "It will be observed that this relates to final judgments. *A judgment appealed from is not a final judgment.* It is merely an adjudication of the inferior court, the finality of which depends upon the action of the superior court" (R. 24). (Italics ours.)

Any reader of the opinion (R. 22-25) would almost certainly infer from this that there had been an appeal from the first ejectment judgment. But it has already been shown by the record that *there was no appeal taken* (R. 6, 23).

2. The appellate court falls into the further error of treating the decree in the interpleader suit as a *decree vesting title* to the real estate.

That the interpleader decree *did not* create or vest title to the real estate is obvious. The only possible

authority of the court in the interpleader suit was to determine who was entitled to the money in Walker's hands. This involved the interpretation of Silas Holmes' will for the purpose of ascertaining in whom was the title in remainder, for such remainderman was clearly entitled to rent-money collected by Walker after the life tenant's death. The trial court's construction of the will gave the money to petitioners as devisees under the will (R. 9, 10). The appellate court's construction gave it to respondent Allen as heir-at-law (R. 15). *In either view the title to the land must have vested at the testator's death* (which occurred about 30 years before—R. 12) or as soon after his death as the claimants came into being. Therefore the equity court *could not have vested title to the land by its decree* in the interpleader suit, and the fact is that neither the first decree (R. 9, 10) nor the decree upon mandate (R. 15, 16) attempted to do so.

It is thus made evident that the appellate court was entirely in error in declaring the fact to be that

> "The judgment in the first ejectment proceeding was *dependent entirely upon the title acquired through the decree* of the Supreme Court of the District of Columbia" (R. 24). (Italics ours.)

3. The third fundamental error of the appellate court is closely related to the second. It is that the appellate court predicated its decision upon the unjustified premise that petitioners had *based their ejectment action upon the trial court's decree* in the interpleader suit. The opinion, in stating the case, says

(R. 23) that petitioners "instituted an action in ejectment against the appellant *wholly based on the decree* then on appeal." (Italics ours.) Throughout the opinion are other frequent references to the same supposed fact, and it is plain from the court's language that it regarded such supposed fact as a controlling one.

But the record shows that petitioners' ejectment action was based, as of course it must have been, upon the title which they had long asserted *as devisees under the Silas Holmes will* (R. 8, 9). Manifestly the judgment therein could not have been based, nor in any way dependent, upon a decree which vested *no title to the real estate in them.* Respondent's replication in the present action (upon which he elected to stand after demurrer was sustained) avers that in the former ejectment action, petitioners "as their source of title and right to possession relied solely" upon Silas Holmes' will, and upon the trial court's decree in the interpleader suit (R. 8, 9). This is the only statement in the record upon this subject and it shows that the present petitioners there asserted and relied upon a *title derived from the will* and very properly availed themselves of the interpretation given the same will by a justice of the same court in a collateral proceeding in which the will had also been involved. *But even if petitioners in that action had erroneously relied upon the trial court's decree in the collateral suit, as their source of title, respondent could not by a second action in ejectment attack the erroneous judgment from which he omitted to appeal.*

4. The appellate court further, in its opinion, says that:

> "The first ejectment suit was merely *in aid of the first decree*" (R. 24, 25). (Italics ours.)

and

> "When that decree was reversed, 'vacated, set aside, and for nothing held,' the judgment for possession shared the fate of the decree upon which reliance was placed for title" (R. 25).

It is impossible to find any justification either in the record or in the law for declaring that this common law action of ejectment was or could have been in aid of the decree for the payment of money in the interpleader suit.

5. The appellate court's opinion concludes thus:

> "It was within the power of the equity court upon the mandate of this court, to have ordered restitution of possession in its decree. Possessing this power, it would be trifling with justice to hold that the court was without power to grant restitution in ejectment" (R. 25).

But, it may be asked, what possible power or jurisdiction had the equity court, in the collateral interpleader suit over money, to enter any order or decree which could disturb the final judgment entered long before by the law court in ejectment, or the possession of the real estate which had been secured by that judgment? Of course, upon the reversal of the equity decree, the trial court could and would have required

the prevailing parties below to surrender the money, which alone was the subject of that suit, had such money been paid to them pending the appeal.

The Court of Appeals in its opinion cites, as authorities for its conclusion, the following *four cases only: Golde Clothes Shop* v. *Loews Buffalo Theater,* 236 N. Y. 465, 470; *Ure* v. *Ure,* 223 Ill. 454; *Dodson* v. *Butler,* 101 Ark. 416, 420; *U. S.* (meaning Bank of U. S.) v. *Bank of Washington,* 6 Pet. 8, 17. Counsel deem it unnecessary to protract this brief by referring to the facts and conclusions in those cases, because a cusory examination will disclose that none of them is at all in point upon the facts or the law of the present case.

As indicated by the foregoing quotations from the opinion of the Court of Appeals, it wholly ignored the distinct nature of the remedies invoked in the ejectment action and the interpleader proceeding, respectively, and the exclusive character of the jurisdiction in such cases. Because in both it happened that the interpretation of the same will was involved, the appellate court fell into the fundamental error of treating the judgment in the one case as dependent upon the decree in the other. The following apt language of this Court in *Buck* v. *Colbath,* 3 Wall. 334, which was directly called to the appellate court's attention in petitioners' brief there, should have prevented any such confusion:

> "It is not true that a court, having obtained jurisdiction of a subject matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other

matters having a very close connection with those before the first court, and, in some instances, *requiring the decision of the same questions exactly.*

"In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits.

"For example, a party having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an action of ejectment to get possession of the land. Here in all the suits the only question at issue may be the existence of the debt mentioned in the notes and mortgage; *but as the relief sought is different, and the mode of proceeding is different, the jurisdiction of neither court is affected by the proceeding in the other*" (pp. 345, 346). (Italics supplied.)

See also *Watson* v. *Jones*, 13 Wall. 679, at page 716.

The only ground upon which respondent sought to avoid the bar of the former judgment was that he had *acquired a new title* since the first ejectment judgment *by virtue of the decree upon mandate of the appellate court in the interpleader suit.* (See Op. Ct. of Ap., R. 23.) The learned *trial* justice in his memorandum opinion rejected this contention, saying:

"I do not think that the plaintiff sets up any title in the present suit acquired since the former suit. * * * He failed to appeal from the former

judgment and cannot now set up any title which he had at that time'' (R. 18).

With that conclusion the appellate court disagreed, holding that the decree upon its mandate in the interpleader suit over the rent money *constituted a new title* to the real estate in Allen. It has already been shown that such could not have been the effect of said decree, and reference to its terms (R. 15, 16) will show clearly that it *did not attempt to vest or create title to the land in anyone.*

To further test the main question here involved, suppose petitioners' ejectment action had been instituted after (instead of long before) the ruling by the Court of Appeals in the interpleader suit, and that the trial court had erroneously given judgment for petitioners notwithstanding that ruling, what would have been respondent's remedy? Obviously his only remedy would have been an appeal from that judgment. He could not acquiesce therein and later on institute a second ejectment suit because of the error in entering the prior judgment.

The case made by the record comes simply to this: Respondent had his day in court in the first ejectment action. He had a plain legal remedy by appeal from the adverse final judgment therein and omitted to avail himself of it. By the present decision the Court of Appeals has given him a remedy which is opposed to settled principles repeatedly declared by this Court, as well as to the terms of an unambiguous statute.

If we are not mistaken in our view that the decision is wrong, that it contradicts the plainest decisions of

this Court, and that it tends to weaken if not to destroy one of the fundamentals of the law, then the fact that the decision was by a unanimous court only makes the situation the more serious.

Conclusion.

It is respectfully submitted that the decision and judgment of the Court of Appeals should be reversed.

J. WILMER LATIMER,
Guardian ad Liten for Infant Petitioners, in Propria Persona.
WALTER C. CLEPHANE,
GILBERT L. HALL,
Counsel for Adult Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 600

KEZIAH REED, GEORGIANA R. SIMPSON, LILLIAN M. H. REDDING, Infant, By Her Next Friend, LEWIS H. REDDING; MARGARET M. REDDING, Infant, By Her Next Friend, LEWIS H. REDDING, et al., *Petitioners,*

vs.

LORENZO ALLEN.

ANSWER OF THE RESPONDENT LORENZO ALLEN TO THE PETITION OF KEZIAH REED AND OTHERS FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

ALVIN L. NEWMYER,
Counsel for Respondent.
of Counsel for Respondent.
GEORGE C. GERTMAN,

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IN THE

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1. This is not a matter of any *great or general importance* but it is simply an ordinary ejectment suit and affects only the parties to it.

2. On July 24, 1925, in an equity suit concerning the property here involved—petitioners and respondent being parties—the Court adjudged and decreed—

> "That the true interpretation of the aforesaid Will of the said Silas Holmes, deceased, is that upon the death of said testator's daughter Virginia Allen, without leaving child her surviving, the real estate described in the bill of complaint, of which said testator died seized and possessed, is devised to Walter Holmes, the adopted son of said Silas Holmes, and to the brother and sisters of the said Silas Holmes, or to their heirs, if deceased, in equal shares, share and share alike, per stirpes; and it appearing to the Court that the fund on deposit in the Registry of the Court as aforesaid represents the rents which have accrued from said real estate since the death of the aforesaid Virginia Allen, it is, Adjudged, ordered and decreed that the said rents be divided among the aforesaid Walter Holmes and the other defendants hereto, who are brothers and sisters of the said Silas Holmes, deceased, or heirs at law of deceased brothers and sisters of the said Silas Holmes, in equal shares, per stirpes." (R. 10, 11.)

The respondent at that time was in possession of the property and he also claimed to own it. He therefore perfected his appeal from the decree by giving a cost bond.

Armed with the said decree adjudging them to be the owners of the property, and being unwilling to await the disposition of the appeal by the Court of Appeals, the petitioners in June, 1926, brought an

action in ejectment against the respondent to eject him from the possession of the property.

They based their action of ejectment and their right to possession upon the said decree and the items of Silas Holmes' Will which it construed (R. 9).

Of course they had no other source of title.

By their ejectment action the petitioners asked the Court to execute the decree of July 24, 1925, which adjudged them to be the owners, by putting them in possession of the property, which it did. The law, of course, raising the obligation on the petitioners, upon reversal of the decree, to return to the respondent whatever he might lose through the execution of the decree by ejectment or otherwise.

NORTHWESTERN FUEL CO. v. BROCK,
139 U. S. 216

Thereafter, upon the hearing of the respondent's appeal from the said decree, the Court of Appeals decided that the respondent alone was the owner of the property and reversed the decree (R. 16).

Thereupon the equity court on May 27, 1927, made a decree by which it vacated its former decree of July 24, 1925, and adjudged the respondent to be the owner of the property pursuant to the mandate of the Court of Appeals (R. 17).

Armed with the said decree of May 27, 1927, and the decision of the Court of Appeals *adjudging him to be the owner of the property* and by reason thereof entitled to its possession, respondent filed the present ejectment suit to oust the petitioners (R. 1-3). *The decree of May 27, 1927, being his source of title.*

Instead of the petitioners returning to respondent, as required by the law, the possession of the property which they gained through the execution in ejectment of the reversed decree of July 24, 1925, the petitioners interposed, as a plea in bar, Section 1002 of the D. C. Code (R. 5-7).

Therefore the question before the Court of Appeals for decision was whether Section 1002, in view of the facts and circumstances, foreclosed the respondent from prosecuting his present ejectment suit.

To have decided that Section 1002 was a barrier to respondent's suit would have been unconscionable as it would permit petitioners to retain possession of property they do not own, never owned and were never rightfully entitled to possession of according to the decree of May 27, 1927.

Petitioners, however, do not complain that the decision is unjust or that it is not consonant with fair dealing, or even that they are wrongfully deprived by it of any rightful possession of the property. Their complaint is that the decision ignores an abstract proposition of law. (Petition, p. 5, par. 7, sub-sec. [2]).

The polar star that guided the Court of Appeals in its disposition of the case, was—

(a) The collapsed foundation (decree of July 24, 1925) supporting the judgment pled in bar.

(b) The legal duty of the petitioners to restore to respondent what he lost through the execution of the decree.

(c) The final judgment in petitioners ejectment suit was a sequel to and in aid of the decree of July 24, 1925, and was ancillary and accessory thereto and it fell with the reversal of the decree.

(d) Respondent had no evidence of his title until May 27, 1927, when the Court adjudged and declared him alone to be the owner of the property—nine months after he had been dispossessed. This fact alone justified the decision of the Court. Freeman on Judgments, Sec. 712, p. 1501, says:

> "Where a right or title comes directly in issue the parties are bound to bring forward every matter or ground which might be urged to establish or defeat it and will be estopped by the adjudication from attempting to relitigate the same right or title upon other or different evidence or ground which might have been urged in the first action. Even a new evidentiary as distinguished from a new ultimate fact, does not change the situation. *But from the rule that an adjudication affects no claims which the parties had no opportunity to litigate, it results that no judgment or decree can prejudice rights which had not accrued to either of the parties at the time of its rendition.* A decision that a right exists, or that a wrongful act has been committed, leaves the party at liberty to show at a future time that since the decision was pronounced the right has expired or the wrong has been abated. And the same is true with respect to a decision that no right or cause of action exists; *it does not bar a second action when new facts have created a right or cause of action. The fact that the same subject-matter was involved in the*

former action is wholly immaterial . . . Under no circumstances will a judgment or decree take effect upon rights not then existing . . . The estoppel of a judgment extends only to the facts as they were at the time the judgment was rendered, and to the legal rights and relations of the parties as fixed by the facts so determined; and when new facts intervene, before the second suit, furnishing a new basis for the claims and defenses of the parties respectively, the issues are no longer the same and consequently the former judgment cannot be pleaded in bar."

And in Sec. 714, p. 1507, the same author says:

"Whenever title is put in issue and adjudicated, the judgment is *res judicata* upon this issue in any subsequent action. *The effect of such an adjudication must, however, be limited to the title or right as it then stood. It is obviously not conclusive as to title and rights subsequently acquired."*

The opinion of the Court of Appeals, written by Mr. Justice Van Orsdel, being impregnable, it is here incorporated in its entirety:

"This appeal is from a judgment of the Supreme Court of the District of Columbia in an ejectment proceeding. The real estate involved in this case was part of the estate of one Silas Holmes, who died November 11, 1892. The appellant here is the testator's great grandson and next of kin, while the appellees are his brothers and sisters and the descendants of brothers and sisters.

"In 1922 litigation arose over the rents derived from the property, which called for a construc-

tion of the will. On hearing a decree was entered by the court below adjudging the present appellees entitled to the rents and profits. From that decree, the present appellant took an appeal. During the pendency of the appeal, and in the absence of a supersedeas bond, the appellees instituted an action in ejectment against the appellant wholly based on the decree then on appeal, and before the case was determined on appeal, a judgment in favor of appellees was entered, from which no appeal was taken.

"In January, 1927, this court (57 App. D. C. 78) reversed the decree of the court below and remanded the case with instructions to enter a decree in favor of the present appellant. Appellant then brought the present action in ejectment against the appellees, basing his title to the property and right to possession upon the decree entered in accordance with the mandate of this court. Appellees pleaded the former judgment in ejectment in bar. Appellant replied alleging that since the former judgment he had acquired a new and different title from that asserted in the former ejectment proceeding. Appellees demurred to the replication and the demurrer was sustained. Appellant elected to stand upon his replication and judgment was entered for the appellees. From this judgment the present appeal was prosecuted.

"There is nothing especially sacred about a judgment in ejectment, nor anything exceptional that does not apply to judgments in general. Section 1002 of the code provides as follows: 'Any final judgment rendered in an action of ejectment shall be conclusive as to the title thereby established as between the parties to the action and all persons claiming under them since

the commencement of the action.' It will be observed that this relates to final judgments. A judgment appealed from is not a final judgment. It is merely an adjudication of the inferior court, the finality of which depends upon the action of the superior court. Until the decree upon which the judgment in the first ejectment suit was based, was disposed of on appeal, it was not a final judgment and was not therefore conclusive upon the parties on the question of title. Title remained suspended pending the appeal.

"The judgment in the first ejectment proceeding was dependent entirely upon the title acquired through the decree of the Supreme Court of the District of Columbia. But that decree, on appeal, was reversed and therefore became void. It conveyed no title whatever upon which the parties could base their action for possession. As the court said in Golde Clothes Shop v. Loew's Buffalo Theatre, 236 N. Y. 465, 470: 'We are told that the defendant rested upon an order of a court. The prop was insecure, and warning was not lacking of the danger of collapse. When the order was reversed and the proceeding dismissed, rights and duties were reestablished, *inter partes,* as if no order had been made * * *.' In that case a landowner had been let into possession under a warrant in a summary proceeding and proceeded to tear down buildings and erect valuable improvements on the land pending appeal. The order was reversed and ejectment proceedings brought against the tenant. It was held that there was not even an equitable defense to the action.

"The decree based upon the mandate of this court was the first and only final decree upon

which a judgment in ejectment could be based. The first ejectment suit was merely in aid of the first decree. When that decree was reversed, 'vacated, set aside, and for nothing held,' the judgment for possession shared the fate of the decree upon which reliance was placed for title. It is elementary that when a judgment, order, or decree is set aside, a dependent judgment or proceeding based upon it for its validity shares its fate and falls with it. (4 C. J. p. 1205; Ure v. Ure, 223 Ill. 454; Dodson v. Butler, 101 Ark. 416, 420.)

"The reversal of a judgment or decree places an implied obligation on a party who has received the benefits of the erroneous judgment or decree, to make restitution to the other party for what he has lost. (U. S. v. Bank of Washington, 6 Pet. 8, 17.) It was within the power of the equity court, upon the mandate of this court, to have ordered restitution of possession in its decree. Possessing this power, it would be trifling with justice to hold that the court was without power to grant restitution in ejectment.

"The judgment is reversed with costs."

Irrespective of the reasons assigned by the Court of Appeals for its conclusion, its judgment was right and should not be disturbed, it being settled law that no final judgment *in ejectment* between the same parties and affecting the same property (as here) can prejudice rights of either party which had not accrued at the date of the prior judgment, but the prior judgment is limited solely to the rights of the parties as they existed at that time.

BARROWS v. KINDRED
4 Wall. 399

MERRYMAN v. BOURNE
9 Wall. 592, 599.

WATSON v. JONES
80 U. S. 679.

BIRD v. CROSS
123 Tenn. 419.

GORE v. GORE
101 Tenn. 620, 624.

BREON v. ROBRECHT
118 Cal. 469.

THRIFT v. DELANEY
69 Cal. 188.

FOSTER v. EVANS
51 Mo. 39.

HAWLEY v. SIMONS
102 Ill. 115, 120.

PREWITT v. WILBORN
184 Ky. 638.

FREEMAN ON JUDGMENTS
Sec. 712, p. 1501;
Sec. 714, p. 1507.

Having thus demonstrated that the case does not involve a question of *great and general importance,* that the decision is consonant with both justice and fair dealing and has the support of reputable authority, and that to have sustained the plea in bar would have been unwarranted by the law and unconscionable, it is respectfully submitted that the application should be denied.

ALVIN L. NEWMYER,
Attorney for Respondent.

GEORGE C. GERTMAN,
Of Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 600.

KEZIAH REED, GEORGIANA R. SIMPSON, LILLIAN M. H. REDDING, ETC., ET AL., *Petitioners*,

vs.

LORENZO ALLEN.

BRIEF FOR THE RESPONDENT.

ALVIN L. NEWMYER,
GEORGE C. GEETMAN,
Attorneys for Respondent.

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vs.

LORENZO ALLEN.

BRIEF FOR THE RESPONDENT.

Statement of the Case.

An understanding of the essentials of this case requires a more comprehensive statement of the facts and its history than is made by the petitioners. Especially is this true inasmuch as the equity suit is the foundation of the present and the prior ejectment suits. Instead of the equity suit being collateral to the ejectment suits, as claimed by the petitioners (Brief 5, 13), it is the pith of the ejectment suits as will be presently pointed out.

1. The Equity Suit.

On August 10, 1922, a Bill was filed in the Equity branch of the Supreme Court of the District of Columbia by one Walker to determine the ownership of certain rent he had collected from the property here involved. He named the petitioners and the respondent as defendants (R. 12).

The petitioners and the respondent were required to interplead, the petitioners on the one hand, and the respondent on the other, touching their rights to the rent which Walker had in the meantime deposited in the Registry of the Court (R. 9).

The cause then came on to be heard by the Court *upon the issues raised by the pleadings between the defendants* (R. 9).

The Court found that the determination of the question of the ownership of the rent depended upon the ownership of the real estate whence the rents were realized (R. 9, 10). So recourse was made to the Will of Silas Holmes, deceased, the common ancestor who died seized thereof (R. 10), for the determination of the ownership of and the title to the real estate. This it had a right to do. Camp v. Boyd, 229 U. S. 530, 552.

Whereupon the Court on the 24th day of July, 1925, *upon the issues raised by the petitioners on the one hand, and the respondent on the other,* decreed as follows (R. 9, 10):

> "This cause came on to be heard upon the issues raised by the pleadings between the parties defendant hereto, as more particularly set forth in their answers to the bill of complaint, said defendants Lorenzo Allen on the one hand and the defendants, Keziah Reed, et al., on the

other, having heretofore by decree entered herein been required to interplead between them touching their rights to the fund ordered to be deposited in the Registry of the Court by the plaintiff, Thomas Walker, and it appearing to the Court that the determination of the proper disposition of said money depends upon the true construction of the last will and testament of Silas Holmes, deceased, late of the District of Columbia, duly admitted to probate and record by this Honorable Court and now of record in the office of the Register of Wills of the District of Columbia, and the parties having stipulated in open court that the facts set forth in the bill of complaint and in the answers thereto as to the heirship of said parties defendant are true, and the questions of law having been argued by counsel and duly considered by the Court, it is, by the Court, this 24th day of July, A. D. 1925,

"Adjudged, ordered and decreed that the true interpretation of the aforesaid will of the said Silas Holmes, deceased, is that upon the death of said testator's daughter Virginia Allen, without leaving child her surviving, the real estate described in the bill of complaint, of which said testator died seized and possessed, is devised to Walter Holmes, the adopted son of said Silas Holmes, and to the brothers and sister of the said Silas Holmes, or to their heirs, if deceased, in equal shares, share and share alike, per stirpes; and it appearing to the Court that the fund on deposit in the Registry of the Court as aforesaid represents the rents which have accrued from said real estate since the death of the aforesaid Virginia Allen, it is,

"Adjudged, ordered and decreed that the said rents be divided among the aforesaid Walter Holmes and the other defendants hereto, who are brothers and sisters of the said Silas Holmes, de-

ceased, or heirs at law of deceased brothers and sisters of the said Silas Holmes, in equal shares, per stirpes.

"And it is further adjudged, ordered and decreed that the Court costs, including fee of guardian ad litem, shall be paid out of the assets of the estate."

Thus the Court adjudged, ordered and decreed that the real estate belonged to the petitioners, equally, as devisees of Silas Holmes, deceased, and that by reason of such ownership they were also entitled to the rent which Walker collected therefrom.

The respondent took and perfected an appeal from said decree, giving a cost bond (R. 10) which, of course, protected him, inter partes.

Upon the hearing and determination of the appeal, the Court of Appeals adjudicated that Silas Holmes' Will was inoperative and that he died intestate as to the real estate. Accordingly it reversed the appealed decree and remanded the cause for further proceedings not inconsistent with its opinion (R. 15). 57 App. D. C. 78.

When the mandate of the Court of Appeals came down the Equity Court on May 27, 1927, "vacated, set aside and for nothing held" the appealed decree of July 24, 1925, and further *adjudged, ordered and decreed* that Silas Holmes' Will was inoperative to pass the title to his real estate and that therefore he died intestate. It then directed the payment of the rent to respondent as *the sole heir at law of Silas Holmes, deceased*; the decree being as follows (R. 16):

"This cause came on to be further heard upon the mandate of the Court of Appeals of the Dis-

trict of Columbia, filed herein on the 16th day of February, 1927. Thereupon it is, this 27th day of May, A. D. 1927,

"Adjudged, ordered and decreed as follows:

"1. That the decree entered herein on the 24th day of July, A. D. 1925, be, and the same *is hereby vacated, set aside and for nothing held;*

"2. That the true interpretation of the Will of Silas Holmes, deceased, mentioned in the bill of complaint, is that upon the death of said decedent's daughter, Virginia Allen, without leaving child her surviving, the said will became inoperative as to the real estate therein described and the said testator therefore died intestate as to the said real estate;

"3. That the fee of the Guardian ad Litem herein be, and the same is hereby fixed at One Thousand Dollars ($1000.00);

"4. That the balance of the fund which is the subject matter of this suit, and which is now on deposit in the registry of this Court, be paid to the defendant Lorenzo Allen, as the sole heir at law of the aforesaid testator, after deducting therefrom any unpaid court costs herein incurred by the parties to this suit."

Therefore we have it adjudicated first by the Appellate Court of this jurisdiction on January 3, 1927, and next by the Equity Court on May 27, 1927, pursuant to the mandate of the Appellate Court, that the petitioners are not but the respondent is the owner of the real estate here involved *by inheritance* from his great grandfather (R. 15, 16).

Notwithstanding this, the possession of said real estate is withheld from the respondent by the petitioners and the present litigation arises out of his effort to obtain its possession.

2. The First Ejectment Suit, No. 71594.

Armed with the said decree of July 24, 1925, and relying upon its integrity for their support (R. 9), the petitioners, unperturbed by the pendency in the Court of Appeals of respondent's appeal therefrom, and to which they were the appellees (57 App. D. C. 78) applied to the coordinate law branch of the said Supreme Court to give them possession of the real estate which the decree of the coordinate equity branch of the Court had declared belonged to them, and also for mesne profits (R. 6).

They based their suit, their source of title and their right to possession solely upon the defeasible decree of July 24, 1925, and the items of Silas Holmes' Will which it construed (R. 8, 9). *They, of course, had no other title upon which to base a suit for possession or mesne profits.*

The respondent in reply to their declaration stated, inter alia, that the source of petitioners' title and their right to possession, namely, the decree of July 24, 1925, was pending on appeal in the Court of Appeals and that the subject matter of the declaration had been transferred from the jurisdiction of the Supreme Court of the District of Columbia to the Court of Appeals for final determination (R. 13).

To that defense the petitioners replied (R. 13) that it did not appear that the respondent had *superseded* the decree of July 24, 1925 (R. 13) and their *demurrer* to the plea was sustained, and, in due course, a judgment, *upon demurrer,* was entered against respondent for possession (R. 15), and upon trial a judgment for $1686.46 mesne profits of the real estate was awarded against respondent (R. 15). No appeal being taken from either judgment, none was neces-

sary; inter partes. United States v. Bank of Washington, 6 Peters, 8, 19.

Law Rule 30 was in force when petitioners filed their declaration. It is as follows:

> "In ejectment suits, the plaintiff shall file, along with the declaration, a list of all deeds, proceedings, or other documents relied upon as constituting his chain of title, together with a reference to the place of record of each, if recorded; and the defendant shall file along with his plea a like list. Unless, within ten days after issue joined, the respective parties shall file in the case, and serve copies as other pleadings are required to be served, a notice of objections, with the grounds thereof, to the deeds, proceedings, or documents, those not objected to shall be subject to no further proof, *but shall be subject to the ruling of the trial court as to the admissibility or legal effect thereof.*"

3. The Second Ejectment Suit, No. 74482.

Armed with the aforesaid decision of the Court of Appeals dated January 3, 1927, and the final decree of May 27, 1927, which adjudged the respondent to be the owner of the real estate here involved and by reason thereof entitled to its possession, the respondent on December 14, 1927, filed his present ejectment suit to obtain possession (R. 1, 2) and as his source of title, as required by Law Rule 30, relied upon the said decree and opinion of the Court of Appeals (R. 2).

The petitioners, *as their sole defense,* set up their final judgment in the first ejectment suit (R. 5, 6, 7), which defense was sustained by the Court (R. 20), from which action the respondent perfected his ap-

peal to the Court of Appeals (R. 20), which Court, after hearing, reversed the judgment appealed from (R. 23), and the same is now here for review.

The equity branch of the Court could and doubtless would have executed its decree of May 27, 1927, had it been requested so to do, by requiring the petitioners to give possession to the respondent. It seems, however, to have been overlooked and in consequence the present ejectment proceeding was begun by respondent to obtain possession. Root v. Woolworth, 150 U. S. 401, 410.

The Three Suits.

Therefore we have three suits instituted in the Supreme Court of the District of Columbia between the same parties and affecting the same property, viz:

(a) First, the equity suit, No. 40408, filed May 4, 1925, determining the title to the real estate, its possession, and the rent therefrom.

(b) Second, the first ejectment suit, No. 71594, filed June 1, 1926 (R. 5) by petitioners against respondent, based upon the decree of July 24, 1925, an appeal from which was at the time pending in the Court of Appeals, *for possession and mesne profits.*

(c) Third, the second ejectment suit, No. 74482, filed December 14, 1925 (R. 1) by respondent against petitioners, based upon the final decree of May 27, 1927, made pursuant to the opinion and mandate of the Court of Appeals (R. 2) and which decree reversed the first decree of July 24, 1925, *for possession and mesne profits.*

ARGUMENT.

The equity suit was in no sense collateral to the ejectment suits. It was the foundation of the first and the present ejectment suits. It alone established the title asserted by the petitioners in their ejectment suit and now asserted by the respondent in the present ejectment suit. In both suits it was relied on as creating the only evidence of title to the property here involved.

While the clear and convincing reasoning of the law applicable to the facts by the Court of Appeals in its decision needs no further support, nevertheless the following observations may be pertinent.

Restitution.

Although Mr. Justice Van Orsdel emphasizes the applicability of this doctrine to the facts of the present case, it receives only scant notice in the petitioners' brief and its controlling influence on the case is nowhere refuted by them.

This is an admission by the petitioners that they cannot escape the unyielding rule of restitution by surrendering to respondent what they gained through the enforcement of their erroneous decree. They point to no way of escape from it. Northwestern Fuel Co. *v.* Brock, 139 U. S. 216.

Notwithstanding the doctrine of res judicata now applicable to all actions alike, it has always been the law as we understand it—

(1) Irrespective of the nature of the judgment, the party against whom the erroneous judgment has been enforced does not lose his remedy against the other party to the judgment. On the reversal of the judgment the law raises an obligation in the party to

the record who has received the benefit of the erroneous judgment to make restitution to the other party for what he has lost. The mode of proceeding to effect this object must be regulated according to circumstances. United States v. Bank of Washington, *ante*.

(2) The reversal of the judgment gives a new right or cause of action against the parties to the judgment and creates a legal obligation on their part to restore what the other party has lost by reason of the enforcement of the erroneous judgment; and, as between the parties to the judgment, there is all the privity necessary to sustain and enforce such right. United States v. Bank of Washington, *supra*.

There is nothing in the doctrine of res judicata which deprives the victorious litigant of his right to have restored to him what his adversary gained through the enforcement of an erroneous decree or which would deprive him of the benefit of his *new right or cause of action* which the reversal of the judgment gives him.

Section 1002 of the Code.

Prior to the Code of the District of Columbia judgments in ejectment were inconclusive. Lyon v. Bursey, 36 App. D. C. 235. Therefore what Section 1002 of the Code accomplished was merely to incorporate in and declare the doctrine of res judicata applicable to ejectment actions and it put them upon the same equality as other actions.

Consequently, in his opinion, Mr. Justice Van Orsdel points out that there is nothing sacred about a judgment in ejectment nor anything exceptional that does not apply to judgments in general (R. 24).

The Equity Suit.

In its last analysis the crux or essence of the subject of the equity suit was that of title; the rent being secondary.

In this connection we especially invite the attention of the Court to the apt decision of the Court of Appeals of New York written by now Mr. Chief Justice Cardozo in Golde Clothes Shop v. Loew's Buffalo Theatres, 236 N. Y. 465, 470 (30 A. L. R. 931), referred to by Mr. Justice Van Orsdel in the opinion of the Court of Appeals (R. 24).

The equity branch of the Court having first obtained jurisdiction of the subject, no coordinate branch of the Court could usurp jurisdiction. The branch of the Court that first obtained jurisdiction retained it until its final decree was made. Until the appeal from the decree of July 24, 1925, was finally disposed of, the equity branch of the Court retained exclusive jurisdiction of the subject. Mackenzie v. Engelhard Co., 266 U. S. 131, 142, 143.

The decree of July 24, 1925, adjudged the petitioners to be the owners of the property but the defeasible quality of their title by reason of the appeal was ingrafted upon it by operation of law and propagated itself through all subsequent stages, Chicago etc. R. R. Co. v. Fosdick, 106 U. S. 47, 71; Marks v. Cowles, 61 Ala. 299.

The First Ejectment Suit.

On June 1, 1926—the date the first ejectment suit was filed—the dispute between the petitioners and the respondent over the title or ownership of the property had been decided by the equity branch of

the Court *pursuant to the issues raised there* and the correctness of that decision was pending before the Court of Appeals. No other branch of the Court, therefore, could supplant the exclusive jurisdiction of the Appellate Court to finally decide the question of title.

No controversy can be treated as res judicata until it has been finally discussed and decided in a court of last resort. Eastern Building and Loan Association v. Welling, 103 Fed. 352, 355.

There was and could be no issue of title involved in the first ejectment suit and none is involved here. In the first ejectment suit the petitioners presented the decree of July 24, 1925, as their evidence of right to possession, and the Court, under Law Rule 30, passed upon the legal effect thereof. There could not possibly be any title established by the ejectment suit as that was the question adjudged by and involved in the defeasible decree of July 24, 1925, upon which the ejectment suit was predicated. Likewise no title is to be adjudicated in the present ejectment suit. That has been disposed of by the final decree of May 27, 1927.

The Second Ejectment Suit.

Although the final decree of May 27, 1927 (R. 16) adjudged the respondent to be the owner of the property, its possession is detained from him by the petitioners upon the pretence that their title is superior to that of the respondent by virtue of Section 1002 of the Code. In other words, it is the petitioners' contention that the final decree of the first branch of the Supreme Court of the District of Columbia passed May 27, 1927, pursuant to the mandate of the Court

of Appeals, is merely a piece of waste paper and entitled to no faith or credit because while the appeal was pending in the Court of Appeals from the decree of July 24, 1925, they procured a final judgment against respondent for possession of the property based upon their decree: That is to say, it is the petitioners' contention that a coordinate law branch of the Supreme Court of the District of Columbia can divest the Appellate Court and the coordinate equity branch of their jurisdiction to establish title and do so itself, and thereby defeat any final decree that the first Court might make pursuant to the mandate of the Court of Appeals.

The Court of Appeals, through its very learned opinion written by Mr. Justice Van Orsdel, has decided that the final decree of May 27, 1927, is entitled to full faith and credit; that it puts an end to the question of title and the right to possession and it must be respected; that the coordinate law Court had no jurisdiction of the question of title as that was exclusively pending in the equity branch of the Court and any attempt to invoke the aid of the law branch was necessarily subordinate to, ancillary and dependent upon the final decree in the equity branch of the Court.

Res Judicata.

For the Court of Appeals to have decided that Section 1002 was a barrier to respondent's suit would have been unconscionable as well as opposed to the law; *it would have permitted petitioners to retain possession of property they do not own, never owned and were never rightfully entitled to possession of,* according to the final decree of May 27, 1927.

In their specification of error (petitioners' brief, p. 6) the petitioners do not complain that the decision of the Court of Appeals is unjust and not consonant with fair dealing or even that they are wrongfully deprived by it of any rightful possession of the property. Their sole complaint is that it ignores a general proposition of law, namely, res judicata, which proposition as has been pointed out plays no part in the present case.

The true test of the identity of causes of action *is the identity of the facts essential to their maintenance.* Pierce v. National Bank of Commerce, 268 Fed. 487, 496. Union Central Life Insurance Co. v. Drake, 214 Fed. 536.

The respondent's possession was taken from him in the first ejectment suit because he could not trace title to himself. He should not be defeated in the present ejectment suit, by reason of the final judgment in the first ejectment suit, when he presents and traces a paramount title to himself since acquired by the decree of May 27, 1927, made pursuant to the mandate of the Court of Appeals, and which decree established title, inter partes. Barrows v. Kindred, 4 Wall. 399.

This Honorable Court in United Shoe Machinery Corp. v. United States, 258 U. S. 451, quoted the doctrine of res judicata from Cromwell v. County of Sac, 94 U. S. 351, 352, as follows:

> "'There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case,

> the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action * * * concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the demand or claim, but as to any other admissible matter which might have been offered for that purpose. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined."

And the Court then goes on to say—

> "In other words, to determine the effect of a former judgment, pleaded as an estoppel, two questions must be answered: (1) was the former judgment rendered on the same cause of action? (2) If not, was some matter litigated in the former suit determinative of the matter in controversy in the second suit? To answer these questions, we must look to the pleadings making the issues, and examine the record to determine the questions essential to the decision of the former controversy."

In the first ejectment suit the petitioners relied upon the defeasible decree of July 24, 1925, as their evidence and source of title while in the present eject-

ment suit the respondent relies as his source of title upon the final decree of May 27, 1927. Obviously, therefore, the rights of the respondent were not and could not have been adjudicated in the first ejectment suit because they were not established until after the final judgment in the first ejectment was rendered. Consequently the judgment in the first ejectment suit was not rendered on the same matters which are involved in the present ejectment suit.

The principle of law which runs throughout the decisions and textbooks on ejectment was stated by the Court in Bird v. Cross, 123 Tenn. 419, thus:

> "There can be no doubt that a judgment rendered in an action to recover possession of real property under the system of pleading and practice adopted in this State, is, as to all matters put in issue and passed on in the action, conclusive between the parties and their privies and a bar in another action between the parties or their privies when the same matters are directly in issue. *The bar of a judgment in such an action is, however, limited to the rights of the parties as they existed at the time when it was rendered; and neither the parties nor their privies are precluded by the same from showing, in a subsequent action, any new matters occurring after its rendition, which give the defeated party a title or right of possession.*"

To the same effect are:

> Barrows v. Kindred, *ante*; Merryman v. Bourne, 9 Wall. 592, 599; Watson v. Jones, 17 Wall. 679; Gore v. Gore, 101 Tenn. 620, 624; Thrift v. Delaney, 69 Cal. 188; Breon v. Robrecht, 118 Cal. 469; Mahoney v. Van

Winkle, 33 Cal. 448; Foster v. Evans, 51 Mo. 39; Hawley v. Simons, 102 Ill. 115, 120; Prewitt v. Wilborn, 184 Ky. 638; Gajan v. Patout & Burguieres, 135 La. 155, 157; Sherman v. Dilley, 3 Nev. 1, 22; Freeman on Judgments, Vol. 2, Sec. 714, p. 1507; Warvelle on Ejectment, Sec. 492, p. 547; Ruling Case Law, Vol. 9, p. 926; Black on Judgments, Vol. 2, Sec. 656, p. 996.

Respondent acquired his title with the right to possession after the execution of the erroneous decree of July 24, 1925, in the first ejectment suit; in the first ejectment suit respondent had *no evidence* of title to assert and consequently no right to possession at the beginning or ending of that action; respondent's *present title* and right to possession were not litigated in the first ejectment suit and respondent's *present evidence of title* and right to possession did not exist and was unavailable to him at the beginning and conclusion of the first ejectment suit.

CONCLUSION.

It is respectfully submitted, in conclusion, that the decision of the Court of Appeals is right and should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 600.—October Term, 1931.

Keziah Reed, Georgiana R. Simpson, Lillian M. H. Redding, etc., et al. Petitioners,
vs.
Lorenzo Allen.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[May 16, 1932.]

Mr. Justice Sutherland delivered the opinion of the Court.

In 1922 Thomas Walker filed a bill of interpleader in the Supreme Court of the District of Columbia, naming as defendants these petitioners (or their predecessors) and this respondent, for the purpose of having determined, as between them, the ownership of money then in the hands of Walker, which he had collected as rentals from certain real property. The rights of the rival claimants to the funds depended upon the construction of the will of Silas Holmes. The court construed the will in favor of petitioners and against respondent, and thereupon entered a decree awarding the money to the former.

Thereafter, and pending an appeal from that decree to the District Court of Appeals taken without a supersedeas, petitioners brought an action in ejectment against respondent to recover the real estate from which the rents had been derived. The title which they asserted in that action rested upon the same provisions of the Holmes will as were involved in the interpleader suit; and petitioners pleaded and relied upon the decree in that suit as having conclusively established the construction of these provisions in their favor. Judgment was rendered for petitioners, and possession of the real property delivered to them under a writ issued to carry the judgment into effect. From this judgment respondent did not appeal. Thereafter, the District Court of Appeals reversed the decree of the District Supreme Court in the interpleader suit and remanded the cause for further proceedings not inconsistent with its opinion. 17 F. (2d) 666. Follow-

ee Lessee of Parrish v. Ferris et als., 2 Black 606, 60

ing the mandate issued thereon, the trial court vacated its decree and directed payment of the rental money to the respondent.

Some months later a second ejectment action was brought, this time by respondent against petitioners for the repossession of the same real property. By way of estoppel petitioners pleaded the final judgment in the first ejectment action, upon which the trial court gave judgment in their favor. Upon appeal to the District Court of Appeals the latter judgment was reversed. 54 F. (2d) 713.

The appellate court thought that the first ejectment action was merely in aid of the decree in the equity suit, and that when that decree was reversed the judgment in the first ejectment action fell with it. With that view we cannot agree. The interpleader suit and the decree made therein involved only the disposition of the funds collected and held by Walker. The decree adjudged, and could adjudge, nothing in respect of the real estate. It is perfectly plain, therefore, that petitioners could not have been put into possession of the real property by force of that decree; and it is equally plain that respondent could not have been put into such possession in virtue of the reversal. So far as that property is concerned, the rule in respect of restitution upon reversal of a judgment is irrelevant. The first action in ejectment was not brought to effectuate anything adjudicated by the decree, or, in any sense, in aid thereof. It was brought to obtain an adjudication of a claim in respect of a different subject matter. The facts and the law upon which the right to the money and the title to the realty depended may have been the same; but they were asserted in different causes of action. The decree in the interpleader suit no more vested title to, or compelled delivery of possession of, the realty than the judgment in the ejectment action required payment to one party or the other of the money surrendered by the stakeholder. Compare *United States* v. *Moser*, 266 U. S. 236, 241.

The judgment in the ejectment action was final and not open to assault collaterally, but subject to impeachment only through some form of direct attack. The appellate court was limited to a review of the interpleader decree; and it is hardly necessary to say that jurisdiction to review one judgment gives an appellate court no power to reverse or modify another and independent

judgment. If respondent, in addition to appealing from the decree, had appealed from the judgment, the appellate court, having both cases before it, might have afforded a remedy. *Butler* v. *Eaton,* 141 U. S. 240. But this course respondent neglected to follow. What the appellate court would or could have done if an appeal from the judgment had been taken and had been heard in advance of the appeal from the decree is idle speculation, since the probability that such a contingency would have arisen is so remote as to put it beyond the range of reasonable supposition. In the first place, the appeal from the decree had been taken and was pending when the judgment in the law action was rendered. It well may be assumed that the natural and usual course of hearing cases in the order of their filing would have been followed. But, in addition to that, both appeals necessarily would have been pending before the appeal from the judgment possibly could have been heard, and it rationally may not be doubted that upon application and a showing of their relationship the court would have heard them together, or at least not have disposed of the appeal from the judgment without considering its connection with the other appeal from the decree.

The predicament in which respondent finds himself is of his own making, the result of an utter failure to follow the course which the decision of this court in *Butler* v. *Eaton, supra,* had plainly pointed out. Having so failed, we cannot be expected, for his sole relief, to upset the general and well established doctrine of *res judicata,* conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of a precedent for so disregarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship. *United States* v. *Throckmorton,* 98 U. S. 61, 65, 68-69.

The rule has been settled for this court that where a judgment in one case has successfully been made the basis for a judgment in a second case, the second judgment will stand as *res judicata,* although the first judgment be subsequently reversed. *Deposit Bank* v. *Frankfort,* 191 U. S. 499. There a federal court had upheld a contract of exemption from taxation, basing its decision upon the judgment of a state court of first instance. Subse-

quently that judgment was reversed. On error to the state court of appeals, it was held that under the doctrine of *res judicata* the judgment of the federal court estopped each party from again litigating the question. Speaking for the court, Mr. Justice Day said (pp. 510-511):

"It is urged that the state judgment upon which the Federal decree of 1898 is based was afterward reversed by the highest court of Kentucky, and, therefore, the foundation of the decree has been removed and the decree itself must fall. But is this argument sound? When a plea of *res judicata* is interposed based upon a former judgment between the parties, the question is not what were the reasons upon which the judgment proceeded, but what was the judgment itself, was it within the jurisdiction of the court, between the same parties, and is it still in force and effect? The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which in its terms embodied a settlement of the rights of the parties. It would undermine the foundation of the principle upon which it is based if the court might inquire into and revise the reasons which led the court to make the judgment. . . . We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons or has been subsequently reversed, that it is any the less effective as an estoppel between the parties while in force."

"It is to be remembered," the court added (p. 512), "that we are not dealing with the right of the parties to get relief from the original judgment by bill of review or other process in the Federal court in which it was rendered. There the court may reconsider and set aside or modify its judgment upon seasonable application. In every other forum the reasons for passing the decree are wholly immaterial and the subsequent reversal of the judgment upon which it is predicated can have no other effect than to authorize the party aggrieved to move in some proper proceeding, in the court of its rendition, to modify it or set it aside. It cannot be attacked collaterally, and in every other court must be given full force and effect, irrespective of the reasons upon which it is based."

Parkhurst v. *Berdell*, 110 N. Y. 386, 392, is cited with approval. In that case the Court of Appeals of New York rejected the contention that the reversal of a judgment which had been given effect as an estoppel in a second action, would avoid the force of the second judgment.

"If the judgment-roll was competent evidence when received," the state court said, "its reception was not rendered erroneous by the subsequent reversal of the judgment. Notwithstanding its reversal, it continued in this action to have the same effect to which it was entitled when received in evidence. The only relief a party against whom a judgment which has been subsequently reversed has thus been received in evidence can have is to move on that fact in the court of original jurisdiction for a new trial, and then the court can, in the exercise of its discretion, grant or refuse a new trial, as justice may require."

See also *Gould et al.* v. *Sternberg,* 128 Ill. 510, 515-516.

These decisions constitute applications of the general and well settled rule that a judgment, not set aside on appeal or otherwise, is equally effective as an estoppel upon the points decided, whether the decision be right or wrong. *Cornett* v. *Williams,* 20 Wall. 226, 249-250; *Wilson's Executor* v. *Deen,* 121 U. S. 525, 534; *Chicago, R. I. & P. Ry.* v. *Schendel,* 270 U. S. 611, 617. The indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 600.—October Term, 1931.

Keziah Reed, et al., Petitioners,
vs.
Lorenzo Allen.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[May 16, 1932.]

Mr. Justice Cardozo, dissenting.

The real estate belonging to Silas Holmes was devised by his will, in the event of the death of his daughter "without issue," to his nephew and to his brothers and sisters then living in equal shares.

Upon the death of the daughter a controversy arose between her grandson, Lorenzo Allen, who was the sole surviving descendant of the testator, and the nephew and brothers and sisters.

An interpleader suit followed to determine the distribution of rents deposited as a fund in the Registry of the Court.

In that suit the Supreme Court of the District adjudged on July 24, 1925, that the true interpretation of the will of Silas Holmes was that upon the death of his daughter "without leaving child her surviving," the real estate described in the bill of complaint was devised to the nephew and the brothers and sisters, and that the rents accruing since her death should be divided in the same way.

On appeal to the Court of Appeals that decree was reversed (January 3, 1927) with the result that on May 27, 1927, a final decree was entered vacating the decree of July 24, 1925, adjudging that the true interpretation of the will of Silas Holmes was that upon the death of said decedent's daughter, Virginia Allen, leaving issue, *i. e.*, a grandson, but no child her surviving, "the said will became inoperative as to the real estate therein described and the said testator therefore died intestate as to the said real estate," and further adjudging that the balance of the fund on deposit in the registry be paid to Lorenzo Allen, the sole heir at law.

In the meantime, the nephew and the brothers and sisters, who for convenience will be spoken of as the collateral relatives, brought an action of ejectment against the heir to recover the possession of the real estate adjudged to be theirs by the decree of July, 1925. In that action they relied solely upon the will and the decree establishing their ownership thereunder. The defendant, admitting the decree, set up the plea that an appeal had been taken from it and was still undetermined. A demurrer to the plea was sustained, and the plaintiffs recovered a judgment (August 21, 1926), under which possession was delivered to them. From that judgment the defendant did not prosecute an appeal.

In December, 1927, upon the entry of the final decree in the equity court the respondent, Lorenzo Allen (the defendant in the first action of ejectment) brought this action of ejectment against the collateral relatives to recover the possession of the real estate from which they had ousted him. The defendants pleaded in bar the judgment previously rendered in their favor in the first action of ejectment. The plaintiff (the respondent here) filed a replication showing the relation between that judgment and the equity decree and the reversal of the decree after possession had been delivered. The Supreme Court of the District sustained a demurrer to the replication and ordered judgment for the defendants. The Court of Appeals reversed and gave the possession to the plaintiff. The case is here upon certiorari.

The respondent, in order to prevail, must uphold three propositions. He must show: (1) that he is entitled to restitution of any property interests lost to him by force of the erroneous decree; (2) that in losing possession under the judgment of ejectment he suffered a loss that was caused by the decree; (3) that the present action of ejectment is, irrespective of its name, an action for restitution, and an appropriate remedy to put him back where he was at the time of the ouster.

1. As to proposition number 1, there is hardly room for controversy. The rule is abundantly settled both in this court and elsewhere that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error. *Arkadelphia Co.* v. *St. Louis, S. W. Ry. Co.*, 249 U. S. 134; *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216; *United States* v. *Bank of Washington*, 6 Pet. 8, 17; *Haebler* v. *Myers*, 132 N. Y.

363. Two remedies exist, the one by summary motion addressed to the appellate court, the other by a plenary suit. The books show that it has long been the practice to embody in the mandate of reversal a direction that the plaintiff in error "be restored to all things which he hath lost by occasion of the said judgment." *Arkadelphia Co.* v. *St. Louis, &c. Co., supra; Haebler* v. *Myers, supra.* What this was might be ascertained through an order to show cause known as a *scire facias quare restitutionem habere non debet. Haebler* v. *Myers, supra.* Inquiry was then made whether anything had been taken "by colour of the judgment," (*Sympson* v. *Juxon, Cro. Jac.*, 698), with an appropriate mandate for the return of anything discovered. On the other hand, the litigant who has prevailed on the appeal is not confined to a motion for summary relief. He may elect to maintain an action, or the court in its discretion may remit him to that remedy. *United States* v. *Bank of Washington, supra; Haebler* v. *Myers, supra; Clark* v. *Pinney,* 6 Cowen 297. One form of remedy or the other, however, is granted as of right. The remedy in its essence like the one for money had and received is for the recovery of benefits that in good conscience may no longer be retained. "It is one of the equitable powers inherent in every court of justice, so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process." *Arkadelphia Co.* v. *St. Louis, &c. Co., supra.* Indeed, the correction may extend to cases where the postulants for restitution are not even parties to the record. *Arkadelphia Co.* v. *St. Louis, &c. Ry. Co., supra,* p. 146; *Stevens* v. *Fitch,* 11 Metc. 248. The whole subject has heretofore been dealt with in a spirit of the largest liberality. The judicial process has been moulded with an anxious effort to put an end as speedily as may be to wrongs originating in judicial errors.

2. Our second inquiry must now be answered: Was the loss of possession under the judgment of ejectment a loss that was inflicted upon the respondent by force of the decree in equity adjudging, and adjudging erroneously, that the petitioners were the owners?

A question very similar was considered by the courts of New York in the early case of *Clark* v. *Pinney,* 6 Cowen 297 (cited by this court in *United States* v. *Bank of Washington, supra*). The plaintiffs had given a note in satisfaction of an execution issued

on a judgment, and thereafter a second judgment was recovered on the note. The first judgment having been reversed, they sued to recover the money paid upon the second. The decision was that the defendant had money in his hands that *ex aequo et bono* was owing to the plaintiffs, and that he should be compelled to pay it back. The court was not deterred from this conclusion by the intervention of a second judgment, unappealed from, between the first judgment and the payment. It looked to the events in their combined significance, and viewed the action for restitution as an instrument of justice. The entry of a second judgment, instead of being a circumstance fastening the rivets of injustice, was merely an additional reason why the rivets should be broken.

The problem now before us should be approached in a like spirit.

If the decree had contained a provision that the petitioners were entitled to a deed to be executed by a trustee, there can be no doubt that upon the reversal of the decree they could have been required to execute a deed back. If the trustee had refrained from executing a conveyance and had been compelled by a separate decree to fulfill what appeared to be his duty, only a narrow view of the remedial powers of equity would discover in the separate decree a decisive element of difference. The restitution that would have been decreed if the auxiliary proceeding had been one in equity, is equally available here where the auxiliary remedy was one at law, an action of ejectment for the recovery of possession. In every substantial sense, the judgment in ejectment was the consequence and supplement of the erroneous adjudication that the petitioners were the owners and entitled to the rents. The respondent made no claim to any right of possession except such right as was his by virtue of ownership under the will. The petitioners made no claim on their side apart from the will and the decree adjudicating ownership in them. Looking into the record of the trial, as we are privileged to do, in order to ascertain the grounds upon which possession was awarded (*Oklahoma* v. *Texas*, 256 U. S. 70, 88; *National Foundry Co.* v. *Oconto Water Supply Co.*, 183 U. S. 216, 234; *Russell* v. *Place*, 94 U. S. 606, 608), we find that there was no opportunity for a consideration upon the merits of the respondent's claim of title, and that within the principle of *res judicata* there was nothing to be tried. Indeed, the respondent made no contention to the contrary, but merely urged

in his plea that judgment be deferred till the appeal from the decree could be determined by the appellate court. The plea being overruled, judgment of ouster followed as an inevitable consequence. It was as inevitable, and as plainly the fruit of the earlier decree in equity, as it would have been if that decree had said upon its face that the respondent was under a duty to surrender possession to the petitioners if possession was demanded.

The argument for the petitioners is that the respondent in this predicament had one remedy, and one only, an appeal from the judgment giving effect to the decree, and that failing to prosecute that remedy, he became helpless altogether. I concede that an appeal was a remedy available to the respondent, but not that it was his only one, or that the failure to pursue it brought down upon his head a penalty so dire. *Clark* v. *Pinney, supra.* Consider the situation in which he would have stood if the appeal had been taken. The judgment of ejectment was not erroneous when rendered. No other judgment could properly have been rendered if there was to be adherence to the principle of *res judicata.* The Court of Appeals would have been constrained to affirm it, whether they believed the earlier decision to be correct or erroneous, if the accidents of the calendar had brought up the review of the judgment before there had been opportunity to pass upon the decree. *Parkhurst* v. *Berdell,* 110 N. Y. 386; *Deposit Bank* v. *Frankfort,* 191 U. S. 499, 512. Even if the appeal from the decree had been heard and decided first, the reversal of the second judgment would have followed, not for any error of the trial court, but in furtherance of substantial justice by the application of principles analogous to those that govern the allowance or denial of a writ of restitution. The subject was considered in *Butler* v. *Eaton,* 141 U. S. 240. The ruling there was that the court in such a situation, if it learns from its own records that the foundation judgment has been reversed, will set aside the second though the trial be free from error. By a short cut to justice it will relieve the litigant of the necessity of resorting to bills of review and motions for a new trial and all the technical apparatus familiar to students of procedure. Cf. *Ballard* v. *Searls,* 130 U. S. 50, 55; *Walz* v. *Agricultural Ins. Co.,* 282 Fed. 646. On the other hand, there are barriers to remedies so summary where the decree of reversal has been rendered in the courts of another jurisdiction. *Deposit Bank* v. *Frankfort, supra.* In

such circumstances the reversal is no longer cognizable without proof, is no longer within the range of judicial notice. There are, besides, other complications resulting from the duty of a State to give effect and credit to the judgments of the federal courts and those of other States. *Deposit Bank* v. *Frankfort, supra.* The very fact, however, that the second judgment will be reversed where the reversal of the first judgment is known to the appellate court by force of judicial notice is in itself a potent token that the second judgment is understood to be the product of the first, and hence within the equity and reason of the writ of restitution. What was written in *Butler* v. *Eaton, supra,* pp. 243, 244, can be applied with little variation here. "The judgment complained of," it was there written, "is based directly upon the judgment of the Supreme Judicial Court of Massachusetts, which we have just reversed. It is apparent from the inspection of the record that the whole foundation of the part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force or effect, and ought never to have existed. Why, then, should not we reverse the judgment which we know of record has become erroneous, and save the parties the delay and expense of taking ulterior procedings in the court below to effect the same object?" The respondent is in a worse plight than was the plaintiff in error in *Butler* v. *Eaton.* He has no remedy in the court of first instance, unless it be by an action of this nature, for the time to move for a new trial on the ground of newly discovered evidence expired with the term. *United States* v. *Mayer,* 235 U. S. 55; *Realty Co.* v. *Montgomery,* 284 U. S. 547. If he had appealed from the judgment in ejectment and the appeal had been heard and decided before the reversal of the decree, his position would be no better. Upon the reversal of the decree afterwards he would still, in the view of the petitioners, have been left without a remedy; there would even then have been no power in the court to undo the wrong that had been perpetrated under color of its mandate. I think we should hesitate long before committing our procedure to so sterile a conclusion.

For the purpose of the case before us, no significance is to be given to the provisions of the Code (Code of District of Columbia, Sec. 1002) whereby "a final judgment rendered in an action of ejectment shall be conclusive as to the title thereby established as between the parties to the action and all persons claiming under

them since the commencement of the action." The object of that statute was to abrogate anomalies as to the effect of a judgment in ejectment that had grown up at common law when the remedy was held to be one affecting possession only, and not directed to the title. *City of Cincinnati* v. *White*, 6 Pet. 431, 443. The codifiers did not mean that a party who has recovered in ejectment shall be more immune from restitution than one in any other form of action. A different question would be here if the persons resisting restitution were not the immediate parties to the suit, but strangers acquiring an interest in the property in reliance on the judgment. As to strangers so situated the remedy of restitution has been excluded since ancient days. *Matthew Manning's Case*, 4 Coke 94; *United States* v. *Bank of Washington, supra.*

3. The third branch of the inquiry need not detain us long. If I have been right in what has gone before, there can be little room for controversy as to the fitness of the remedy. An action for restitution has for its aim to give back to a suitor what a judgment has taken from him. What was taken from the respondent under the shelter of this reversed decree and because of its coercive power was the possession of a tract of land. The effect of a judgment in this action of ejectment will be to re-establish his possession and put him where he was before. The quality of the remedy is to be determined by the end to be achieved, and not by any label, whether restitution or ejectment.

A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity. By the judgment about to be rendered, the respondent, caught in a mesh of procedural complexities, is told that there was only one way out of them, and this a way he failed to follow. Because of that omission he is to be left ensnared in the web, the processes of the law, so it is said, being impotent to set him free. I think the paths to justice are not so few and narrow. A little of the liberality of method that has shaped the law of restitution in the past (*Clark* v. *Pinney, supra; Arkadelphia* v. *St. Louis, &c. Ry. Co., supra*) is still competent to find a way.

Mr. Justice BRANDEIS and Mr. Justice STONE join in this opinion.